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KEY CONCEPTS IN THE FINDING, DEFINITION AND CONSIDERATION OF CUSTOM LAW IN TRIBAL LAWMAKING

*Pat Sekaquaptewa**

Introduction

This is the second in a two-part series exploring how Native Nation legal systems — and the Hopi Tribe in particular — handle custom. The first article, “Navigating Rights within the Formalized Legal Pluralism of the Hopi Nation,”¹ focused on the tensions between the customary law systems persisting under the Hopi national government and international and United States (U.S.) federal government admonishments to protect human and civil rights. The article also focused specifically on the question of whether a Native Nation is legally, morally, and/or pragmatically obligated to bring its customary law systems in line with international treaties/covenants, and/or U.S. federal law with respect to such rights protection, and how this might be accomplished. This second article focuses on exploring the methods of incorporating local custom — using more or less Western processes — with an eye toward the needs of Native Nation legislatures and judges.² Specifically, I seek to design an approach for thinking about how local values

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1. Article to be submitted as a part of an edited volume titled *ETHICS, POETICS, AND AESTHETICS AMONG THE HOPI: ESSAYS IN HONOR OF EMORY SEKAQUAPTEWA* (Justin Richland ed.) (forthcoming).

2. In drafting these articles, considerations of target audience, the priorities and foci of the legal and academic discussions, the writing style, and the ideal formats have troubled me, primarily because these considerations orbit around an important debate about whose priorities should govern in the dominant legal academic discourse - those of the Western system or those of Native communities? As Native scholars we are responsible to two audiences, our academic peers in the law as a whole and to those Native thinkers who can be thought of as the Native or tribal academy. We should be committed to speaking to both with equal time and space, lest we stunt the growth of our Native Nations’ collective ideas and institutions. My initial decision to put the Western focus first is not some recognition of any superior or foundational perspective, but rather the need to create some touch points for cross-communication both between the Native and non-native audiences and between Native Nations/tribes.

and ways may be captured and integrated into written tribal law (positive or common law). As demonstrated by the topical progression from the first article to the second article, I argue that truly representative Native Nation states must make some attempt to respect and incorporate the multiple customary law systems existing within their borders within their formal legal systems. My intended primary audience includes my peers — tribal judges, leaders, council members, and tribal law academics — particularly those who are also stakeholders.³

This inquiry arises from my work as a legal clinician entrusted to advise American Indian tribes on the drafting of tribal constitutions and legislation and my work with the tribal common law as a tribal appellate judge. Over the years I have been struck by the lack of a comprehensive theory to guide tribal lawmakers and judges in their policymaking and lawmaking/law-interpreting activities. I have also been struck by the lack of organically grown legislation with the requisite community notice and input. I have been surprised to find a common practice whereby elder community members are randomly consulted “on the spot” to provide information regarding custom where the context, relevance, and application of such information is reserved to the sole discretion of (often non-Native) drafting attorneys or judges. In the case of judging, there is an expectation that a tribal judge will use his or her knowledge and experience of tribal custom; for instance, the judge can take judicial notice of custom, simply toss out Western-styled court rules and engage instead in the “righting of relationships,” or engage in a more Western-styled fact-finding process to find the relevant, applicable custom that will then be applied within the sole discretion of the judge. In all such cases, drafting attorneys and judges are *de facto* policymakers in great need of useful theories or at least guidelines for working with custom.

3. Unfortunately, until recently, there seems to have been little to no respected academic space for tribal stakeholders to reflect, theorize, critique, and generally problem-solve without having the discussion hijacked for other purposes - for example, jurisdiction over nonmembers. It is important to find a way to facilitate the priorities of stakeholder dialogue while simultaneously fostering cross-communication. In keeping with this goal, I have set and followed some ground rules for this article. I have attempted to avoid the use of discipline specific vocabulary as a short cut and I have tried to define and explain words and concepts fully in lay-friendly terms. Where I have referred to anthropological or legal theories in the main text, the characterizations and analyses are directed to the primary stakeholder audience. To the best of my abilities, I have used footnotes on points of special concern or interest to the disciplines; otherwise, I myself might have inadvertently hijacked this article for other purposes.

In Part I of this article I set out a functional definition of “custom,” including the identification of custom as a kernel of law and custom of a legal nature in its natural setting. In Part II through Part IX, I reintroduce legal anthropologist Leopold Pospisil’s theory on the basic elements of law (or how to identify custom-as-law in its natural setting) and apply this to the Hopi case of *James v. Smith*.⁴ In Part X, I explore the national debates about the pros and cons of using custom. And finally, in Part XI, I discuss the implications for solutions — legislative or otherwise — to problems raised.

I. Defining “Custom Law”

A. Definitions of “Custom” and Debates over Its Use

Legal academics and tribal legal professionals cover a wide range of philosophical, anthropological, sociological, and jurisprudential terrain in an attempt to define what is custom.⁵ Some focus on defining “law” to include custom.⁶ Some analogize custom to American common law or define it as part of a unique tribal or indigenous common law.⁷ Many assert that it is a way of doing things — particularly, resolving disputes and/or repairing

4. *James v. Smith*, No. CIV-019-94 (Hopi Tribal Ct. Apr. 15, 1998).

5. I use the term “custom” throughout this article to capture all its possibilities without precise definition. I hope that my entire article will serve as a starting point for parsing more precise elements and meaning. I have selected this specific term, as I find that it is the popular shorthand in tribal government circles for whatever the particular tribe, group, or person means by it; as should be clear from a reading of this article, it can mean a universe of different things.

6. See, e.g., James Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT’L & COMP. L. REV. 55, 73 (1997) (defining law as norms enforced by institutions and includes customs “as group of norms”); see also Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287, 315 (1998) (stating that “aligning law with custom in tribal courts promotes efficiency and fairness”).

7. James W. Zion, *Searching for Indian Common Law*, in INDIGENOUS LAW AND THE STATE 121-48 (B.W. Morse & G.R. Woodman eds., 1988) (“For the purpose of a rational discussion of Indian customary law, it is best to use the term ‘Indian Common Law.’ Indian government, law and daily life are founded upon long-standing and strong customs, and since the stated rationale for the English Common Law is that it is a product of custom, that approach may be used for Indian law as well. Indians have every right to assert that their law stands on the same footing as the laws of the United States and Canada. It is unfortunate that the term ‘custom’ implies something that is somehow less or of lower degree than ‘law.’”); Cooter & Fikentscher, *supra* note 6, at 315 (hypothesizing that “the common law process in tribal courts focuses more on relationships and less on rules in resolving disputes”).

relationships.⁸ But my purpose here is not to create a definition to legitimize custom, however defined, in the eyes of nonmembers or to distance it from Western law or the stigma of assimilation to legitimize it in the eyes of members. Rather, we need a functional definition to assist us in policymaking, be it a part of the executive decision-making process, legislation, or adjudication.

B. Custom as a Way of Doing Things

Equating custom with traditional dispute resolution is misleading. Traditional dispute resolution constitutes an aspect of custom, but it does not embody the totality of it. Custom is more than a way of resolving disputes; it also includes worldview, values, socially reinforced norms, etc. Further, today there are important questions concerning the source of particular models of “relationship-righting” processes.⁹ It has been popular in federal Indian law academic circles to focus on traditional dispute resolution defined

8. Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J.L. & PUB. POL’Y 74, 75-76 (1999) (stating that “‘indigenous jurisprudence’ means the basic approach to dispute resolution inherited from pre-colonial practices and ‘traditional principles’ refer to specific concepts of human behavior and good relationships which can be identified in pre-colonial practices,” and that “[a] system of ‘tribal’ law aims to repair any breaches in the web of counterbalancing rights and duties”); James W. Zion, *Ten Commandments for Integrating Traditional Indian Law into Modern Indian Nation Courts* 8-11 (1988) (paper prepared for the Tribal Law & Policy Institute, on file with author) (stating that “law ‘made by the whole people’ is custom” and includes a process of talking out a dispute; that “traditionally, Indians took their problems to relatives and Elders”; and that contemporary Navajo peacemaking uses “mediators” selected by the community who guides the parties “to cause a ‘cognitive-affective shift’ in thought from ‘head thinking’ or negative attitudes to ‘heart thinking’ or empathy”); see also Cooter & Fikentscher, *supra* note 6, at 315 (hypothesizing that the common law process in tribal courts focuses more on relationships and less on rules in resolving disputes). See generally Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997).

9. See, e.g., Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117, 125-26 (2000-2001) (recounting how the alternative dispute resolution of the 1960s and 1970s was spearheaded by Chief Justice Earl Warren after he “delivered a number of speeches in which he advocated an alternative to courts that focused less on adversarial tactics, and more on harmony, personal relationships, community, and healing”); Laura Nader & Jay Ou, *Idealization and Power: Legality and Tradition in Native American Law*, 23 OKLA. CITY U. L. REV. 13, 25 (1998) (arguing that “alternative dispute resolution entered reservations in the 1970s via national Indian conferences, professional networks, and government and private institutions” where “federal and state governments, in concert with tribes and corporations began to push for negotiated settlements to resolve disputes that would otherwise have had to undergo prolonged and costly litigation”).

in one of three ways: (1) as unique to a particular tribe's traditional dispute resolution ways; (2) as borrowed and modified from other tribes; or (3) as borrowed and modified from Western mediation, arbitration, or therapeutic models.¹⁰ Dispute resolution is generalized as a process whereby a respected third person facilitates disputing parties to repair broken relationships with each other, their extended family, the community, and the natural world. The goal is not to fact-find or guilt-find and there is no winner or loser.¹¹ It is important to remember, however, that this is a generalization that cannot possibly be 100 percent accurate in describing the particulars of over 500 different tribal societies. If the dispute resolution model is an import, one must ask: What is the source of the model and does the model supplant persisting local indigenous processes? How should the imported model be usefully modified to reflect local needs and values? Is the intent to have the tribal court use this process to the exclusion of other processes, such as the adversarial process, or to set up court-annexed or independent processes? Traditional dispute resolution processes and imported "relationship-righting" processes are critical components of present-day tribal justice systems, but they must be thoughtfully supported, annexed, or, if private, used by more Western-styled bodies. They should also be modified where necessary. Tribal members and others should have a maximum array of processes and remedies available; however, it should be clear that defining custom as essentially "traditional dispute resolution" is of little assistance in policymaking with respect to substantive custom concerns.

C. Judicial Discretion as Custom

A number of legal scholars assert that in tribal dispute resolution, tribal judges, influenced by their knowledge and sense of fairness based on their experience with tribal ways, focus less on rules and more on relationships.¹²

10. See, e.g., Joh, *supra* note 9, at 127-28 (pointing to the external resources relied upon in the development of the Navajo Peacemaker Court).

11. See, e.g., Porter, *supra* note 8, at 250-52 ("Peacemaking is the process of resolving disputes by involving respected third parties who induce disputing parties to find common ground and restore their underlying relationship by utilizing a variety of social, spiritual, psychological, and generational pressures.").

12. Cooter & Fikentscher, *supra* note 6, at 314-15 ("A tribe's way of life is the sum of its customs and traditions, which are often imbedded in stories beginning with the creation of the world. The customs and traditions provide an encompassing guide to living backed by sacred sanction. The Way of the tribe should shape the tribal judge's sense of justice. . . . Tribal people live their lives among kin, so a dispute indicates a rupture in these relationships. Dispute resolution in the tribe typically aims to repair relationships. To repair relationships, adjudicators

In a sense, this is also an argument for custom as a way of doing things. The difference here is that the focus is on the tribal judge in tribal court instead of a traditional authority or peacemaker in a traditional or structured “relationship-righting” process like peacemaking. Again, custom is more than dispute resolution, including also worldview, values, socially reinforced norms, etc. There is also an important debate to be had over how much discretion and flexibility a tribal judge should have; in other words, should a tribal judge be required to follow certain statutory provisions or rules governing the nature of the proceeding and the finding and application of custom? Defining custom as “judicial discretion” is also of little assistance for policymaking purposes with respect to substantive custom concerns.

D. Substantive Custom

It is clear that we need a functional definition of substantive custom for both communication and consideration of what is actually at stake and what outcomes are intended in a given policy debate or judicial deliberation. Equating custom with relationship-righting processes or judicial discretion is imprecise — dull tools for our purposes. The functional definition that I propose is one that distinguishes: (1) custom as a kernel of law; (2) custom of a legal nature in its natural setting; and (3) custom that is enforceable under tribal law.

1. Custom as a Kernel of Law

Custom as a kernel of law has variously been described as “feelings,” “practice,” “habit,” “usage or practice,” and “beliefs and conduct.”¹³ Conduct, habit, practice, and usage connote action by people, something that we can see and measure. Beliefs and feelings are subjective. They are harder to measure. In all societies there is also a noted difference between what

examine the character of the parties and the history of their interaction, not just the particular event in the legal complaint. Compared to other American courts, we expect tribal courts to attend to relationships more than rules.”) *But see* Joh, *supra* note 9, at 123-24 (suggesting that where “custom is invoked to justify the relaxation, or virtual elimination of Anglo-American procedural rules,” parties “receive neither a Western-style adjudication nor a customary one”).

13. The Western legal definition of “custom” is, “A practice that by its common adoption and long, unvarying habit has come to have the force of law.” BLACK’S LAW DICTIONARY 413 (8th ed. 2004). Barsh defines “traditional principles” as referring to “specific concepts of proper human behavior and good relationships which can be identified in pre-colonial practices.” Barsh, *supra* note 8, at 75.

people say they do (or should do) and what they actually do, making stated beliefs and feelings less reliable than beliefs and feelings demonstrated by conduct, habit, practice, and usage. Our definition of custom as a kernel of law should require both a feeling/belief element and conduct element, as tribes will use this definition to pick and choose which customs should be reinforced by tribal institutions.¹⁴

2. Custom of a Legal Nature in Its Natural Setting

It should come as no surprise that traditional legal systems have already sorted custom kernels, recognizing some as legal and others as mere values. The challenge is identifying where this has happened. In a previous article I distinguished these kernels as “legal norms” and “social norms.”¹⁵ Here scholars begin to disagree about what makes a custom kernel legal. Some argue that a “practice must be commonly adopted by long, unvarying habit,” or “be a long established, unvarying, usage or practice.”¹⁶ Others argue that

14. Valencia-Webber defines custom to include generally held beliefs and conduct in compliance with such beliefs, but separated from other cultural elements that imply non-formalized ideas or codes of conduct. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 244-46 (1994).

15. I subdivided custom into the following four concepts: social norms, legal norms, traditional practices, and current local practices.

Anthropologists define social norms to be “felt standards of proper behavior.” A legal norm, by contrast, is a felt standard of proper behavior that is “actively protected conduct.” In layman’s terms, social norms are what most people in a given community would consider to be proper behavior (people should refrain from gossiping for example) but which do not rise to the level of an enforceable legal duty. Legal norms are expected proper behaviors backed by official sanctions.

Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL’Y 761, 777 (2000). For an in-depth discussion of social and legal norms, see K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* ch. I-III (special ed. 1992).

16. Zuni prefers the term “indigenous law” or “traditional law” and would define it to include law derived from long established usage or practice, where it has acquired its force by common adoption or acquiescence, and where it does not vary (generally unwritten). Zuni anticipates that “the primary method through which customary law will become part of the tribal legal system is through” both judge-made law and legislation. Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL’Y 17, 27 (1997) [hereinafter Zuni, *Strengthening*]; see also Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law*, available at http://tlj.unm.edu/articles/volume_1/zuni_cruz/text.php [hereinafter Zuni Cruz, *Tribal Law*].

more is required or that a certain kind of recognition of the forgoing is required — that some traditional authority must identify the underlying value or principle, restate it as a rule, and apply it in a real case.¹⁷ The liveliest debate surrounds the question of whether the presence of “sanctions” is required, however defined.¹⁸ The most rigorous definition would require the presence of long-established practice, recognized and applied by an authority, and enforced by sanction. Tribal leaders and policymakers should discuss and come to some agreement about what constitutes custom law in its natural setting. For example, should just long established practices qualify or should recent, generally accepted practices also qualify? How do we want to detect these practices, by looking at the past and present decisions of traditional authorities and/or by general community feedback/polling? How or why might the application or non-application of traditional sanctions be relevant or useful?

3. Custom Enforceable Under Tribal Law

A central inquiry of this article is what customs should be enforced as part of tribal law. Most scholars argue that this inquiry should be left up to the

17. Zion describes “law” as consisting of “norms which are [applied] by institutions” through a “process of double institutionalization” - where an institution identifies values in a society, restates them as rules and reapplies them in decisions framed by the rules. He defines “a ‘norm’ [as] a rule . . . which expresses the ‘ought’ aspects of relationships between human beings” and includes values or moral principles. “Values,” according to Zion, “are shared feelings about good ways in life or what conduct should be avoided. A ‘moral principle’ is a fundamental value which people follow” and customs are that “body of norms which are followed in practice.” Zion & Yazzie, *supra* note 6, at 73.

18. *See id.* at 74 (“Indian traditional legal systems are ‘horizontal.’ Indian clan and kinship groups are legal systems. Vertical systems [European law] use hierarchies of power and authority, backed by force and coercion, to operate their legal systems. Horizontal systems are essentially egalitarian and function using relationships. Many reject force or coercion.”); Zion, *supra* note 6, at 3 (punishment, force, and coercion are not necessary elements of law and “it is possible to operate a legal system without police or jails”). *But see* Nader & Ou, *supra* note 9, at 16-17. Nader recounts Ruth Benedict’s book, *Patterns of Culture*, where she portrayed Pueblo society as “characterized by norms of social cooperation and by the internalization of high value placed on social harmony . . . elaborating a system of social control devoid of coercive physical sanctions.” *Id.* This characterization was challenged by E. Adamson Hoebel, given his work finding that “the Pueblos were a complex society known to use extreme forms of physical sanctions applied by designated . . . officials” and reminding us that “the U.S. government [later limited and supervised] Pueblo autonomy in their exercise of penal sanctions.” *Id.* Hoebel “recognized the power of the Pueblo state.” *Id.* at 17.

discretion of a tribal judge as opposed to being legislated.¹⁹ The concern is that legislation tends to freeze custom in time and legislators cannot adequately predict or provide for all variations of an issue or problem. Judges, on the other hand, deal with real parties in live disputes case-by-case and are in a better position to make tough calls tailored to specifics. But even where a judge is the proper and authorized entity to identify, define, apply, and enforce custom, what guidelines should she follow? Again, some scholars say the decision should be left to the judge completely. For example, Zion feels that tribal judges can inject their worldview and experience by using the basic common law method. Tribal judges should: “(1) figure out the right thing to do; (2) look up the law [including finding applicable custom]; and (3) use the law to state the right thing to do in a judgment.”²⁰ Cooter and Fikentscher would argue that for some tribes it is enough that the Native judge brings her worldview and experience to bear by focusing on broken relationships and their repair, even at the expense of ignoring Western-styled court rules.²¹

The philosophers, anthropologists, and legal scholars tend to provide lengthy lists of criteria of “what is law” or “what should be legal” that might be useful for judges in determining what the tribal common law should recognize and apply.²² Table 1 below includes proposed criteria for what should be included in the tribal common law. The criteria contained in the left column is derived from the experience of the drafting of the Uniform Commercial Code with a restatement by Valencia-Webber. The criteria in the right column comprises Pospisil’s “basic elements of law.”

19. Zion, *supra* note 6, at 7-8; Zuni, *Strengthening*, *supra* note 16, at 27 (“The primary method through which customary law will become a part of the tribal legal system is through the development of judge-made law . . .”); Zuni Cruz, *Tribal Law*, *supra* note 16 (discussing the fear of the dangers of codifying traditional law to include “freezing” it or “getting it wrong”).

20. See, e.g., Zion, *supra* note 6, at 7 (contending that the “common law process is superior to legislation” as it is very plastic and adaptable and can grow and respond to changes in societal perception).

21. See, e.g., Cooter & Fikentscher, *supra* note 6, at 315.

22. As noted by German comparative law scholar Wolfgang Fikentscher in his 1988 paper on the anthropological meaning of law, “In legal anthropology and jurisprudence, the number of definitions of law is legion.” WOLFGANG FIKENTSCHER, *MODES OF THOUGHT IN LAW & JUSTICE: A PRELIMINARY REPORT ON A STUDY IN LEGAL ANTHROPOLOGY* 16 (1988).

TABLE 1

Valencia-Webber/Levie ²³	Pospisil
<p>To become enforceable at common law, a custom has to be:</p> <p>(1) legal;</p> <p>(2) notorious;</p> <p>(3) ancient or immemorial and continuous;</p> <p>(4) reasonable;</p> <p>(5) certain; and</p> <p>(6) universal and obligatory ("a creature of history").</p> <p>Valencia-Webber restates this as "the thought and conduct must be known, accepted, and used by people of the present day."</p>	<p>Pospisil argues that, in any group or subgroup,²⁴ law is comprised of four basic attributes:</p> <p>(1) Authority - The principle(s) of the decision passed by a legal authority and where such decision is actually followed by the parties to the dispute;²⁵</p> <p>(2) Intention of Universal Application - The authority, in making the decision, intends that it apply to all similar situations, whether the authority actually consistently follows through with this or not;²⁶</p> <p>(3) Obligatio - The authority, recognizes in some way, the relationship of the parties, including a duty owed and breached by one, and the resulting right of the other to have the situation redressed;²⁷ and</p> <p>(4) Sanction - resulting physical or social/psychological sanctions are applied.²⁸</p>

23. Valencia-Weber, *supra* note 14, at 245-46 (attributing this list of criteria to Joseph H. Levie, *Trade Usage and Custom Under the Common Law and the Uniform Commercial Code*, 40 N.Y.U. L. REV. 1101, 1103 (1965), and noting a conceptual connection between the customary basis of common law and its progeny in the UCC).

24. LEOPOLD POSPISIL, *ANTHROPOLOGY OF LAW* 98-99 (1971).

25. *Id.* at 31-32, 37.

26. *Id.* at 79.

27. *Id.* at 81-82.

28. *Id.* at 92.

Although I do not think that it is necessary to adopt such rigid lists, it is important to identify the underlying concerns of these scholars, as these concerns may also matter to a judge in a given case. Important underlying concerns include: (1) legality - was the custom of a legal nature in its natural setting? (Notice that Pospisil's entire list of criteria is testing for such legality); (2) notice - is the custom well-known or notorious? In other words, is it fair to impose it on people; (3) old but continuing - is the custom "ancient or immemorial and continuous?" (But what about considering newer generally accepted practices as well); (4) reasonable and certain - is the given proposed application of custom today practical and is it clearly defined and understandable?; and (5) universal and obligatory - I would argue that the question here is whether the custom is expected to bind all people similarly situated *but within a given legal level*. This would be in line with Pospisil's requirement of an "intention of universal application." It is likely, given the variance in tribal culture and ways, as well as given diverse contemporary needs, that the list of preferred criteria will vary from tribe to tribe.

II. Why Look to Theories of the Anthropology of Law in Working with Custom?

Tribal leaders, legislators, and judges today repeatedly face the task of identifying custom and factoring it into their policymaking. They must also consider when and how to incorporate custom into tribal legislation and into the written decisions of the tribal court. There are important questions concerning the transparency of the respective processes (the decision-making processes of the executive, legislative, or adjudicative branches), the reliability of the sources and characterizations of custom, and the relevancy and applicability of custom to the problems or disputes being addressed.²⁹

Why look to anthropology to answer such questions?³⁰ It has been well

29. Some, perhaps many, familiar with Hopi ways may find it ironic that a Hopi tribal member, in respecting custom, is arguing for transparency in governance given the traditional village political processes requiring secrecy in higher order decision-making at Hopi. I would ask the reader to take careful note of the policymaking legal level to which I refer - that of the Tribal Council and tribal courts - not the traditional village Kikmongwi/leader, societal leaders, or clans. Here I focus on what the secular tribal leaders are making of, and what they are doing with, custom.

30. There is a chicken and egg quality at work here where outsiders observe tribal societal structure and operations and then apply their analytical skills to describe what they are seeing. Where this is skillfully done, they may just be describing what many Native people already know about themselves. However, the significant value added comes in the form of terminology in the discipline and in the English language that may be used to communicate with

documented that Native people have a long history of distrust and anger when it comes to anthropologists — and in many cases rightly so. Yet it is also the case that sound legal anthropology offers valuable tools for helping tribal policymakers define, communicate, and explore complex modern problems and solutions that involve custom.³¹ Finding custom law and analytical tools, derived from anthropological theory, have been useful to the Hopi appellate justices in laying the common law foundation to bolster widely valued custom and to accommodate the changing needs and expectations of the Hopi people. Indeed, the case law of the Hopi Appellate Court reflects the application of these tools: (1) recognizing that Hopi is comprised of multiple legal levels — thus recognizing that no one judge may have the capacity to take judicial notice of tribe-wide custom where it varies from village to village and perhaps within clans;³² (2) setting up a custom-law-finding-hearing process for the reliable identification of relevant local custom where the villages decline to handle disputes in their own way;³³ (3) recognizing traditional authorities and respecting their decision-making powers and authoritative statements on the applicable local custom and/or tradition;³⁴ and (4) carefully considering the application of

our non-member judges, consultants, advisors, and non-Indian leadership and academics to further our highest priorities and values.

31. It may come as a surprise to non-Indians that tribal leaders and judges find themselves looking for the legal in their own custom. There are good reasons for this, which have been hard to explain without useful theory. I will provide one example here. Pospisil's theory that there are multiple legal systems and legal levels within most societies and that every group and subgroup has law, appears to be in line with what many Native people have always known - we have different tribes, clans, bands, societies, etc., and they may have different values and customs. See POSPISIL, *supra* note 24. It is therefore difficult for any one judge or tribal council member to speak for all with respect to custom as he or she belongs to a particular, say, clan or band. So, tribal leaders and judges find themselves looking for law as well.

32. The concept of legal levels is extant among Hopis, their leaders, and their judges and is relevant for at least jurisdiction purposes in almost all non-criminal cases before the Hopi Tribal Courts (primarily on the question of whether the matter should be heard and decided by the village of one or more of the parties or by the tribal court).

33. Hopi Indian Credit Ass'n v. Thomas, No. AP-001-84 (Hopi App. Ct. Mar. 29, 1996), available at <http://www.tribal-institute.org/opinions/1996.NAHT.0000007.htm> (notice and pleading of applicable custom and tradition); Smith v. James, No. 98AP000011 (Hopi App. Ct. Nov. 16, 1999), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1999.NAHT.0000002.htm> (setting out procedures for the trial court to use when conducting custom law finding hearings, including the development and approval of questions to be asked of witnesses, the need for a second round of custom law finding hearings to develop the applicable standard, and the necessity for a fact-finding hearing following the conclusion of a custom-law finding process).

34. Sanchez v. Garcia, No. 98AP000014 (Hopi App. Ct. Nov. 12, 1999), available at <http://>

custom to dissenters and reformers, including the underlying rationales and impacts to the tribe, villages, clans, and individuals.³⁵

Below, I borrow Leopold Pospisil's theory of the basic attributes of law to analyze a Hopi land dispute case.³⁶ I do so with the intent of creating and illustrating a tool box of concepts for use by tribal leaders and judges in their policymaking with respect to custom. I am particularly interested in tools that will assist with: (1) the reliable identification, capture, and integration of custom in tribal legislation and judicial opinions; (2) determining what customs can and should be enforced as part of tribal law; and (3) determining when it is practical and fair to do so. In addition, these tools should ensure that court processes are transparent and responsive to the tribal public impacted by the tribal law and custom at issue.

Pospisil argues that law can be found in every group and subgroup of any society, regardless of the existence of formal state institutions.³⁷ He further argues that, in any group or subgroup, law is comprised of four basic attributes: (1) Authority; (2) Intention of Universal Application; (3) Obligation; and (4) Sanction.³⁸

I have selected Pospisil's theory over that of others for a number of persuasive reasons. First, unlike many of his predecessors, those studying and writing about the origins of law, he developed his theory by living for extended periods of time with diverse tribal cultures, by actually learning their languages, and by observing the resolution of their disputes.³⁹ Pospisil himself has been highly critical of those who engage in Western-biased philosophizing or speculation without undertaking rigorous field work — that is, observing how

www.tribalresourcecenter.org/opinions/opfolder/1999.NAHT.0000001.htm.

35. I do not survey the Hopi trial and appellate case law here, which would make up the body of another law review article, but it is fair to say that the Hopi judges strive to do this in every case where custom is raised. *See generally James*, No. 98AP000011; *Sanchez*, No. 98AP000014; *Thomas*, No. AP-001-84.

36. *See* POSPISIL, *supra* note 24.

37. *Id.*

38. POSPISIL, *supra* note 24, at 32-32, 37, 79, 81-82, 92.

39. Leopold Pospisil began his studies on Roman law at the Charles University in Prague. He continued his studies in the United States at Willamette University in Oregon and then at the University of Oregon, where he submitted a masters thesis on the topic of the "Nature of Law" in the Department of Anthropology. He undertook his early fieldwork on the Hopi Indian Reservation in 1952. Following this, he pursued a doctorate at Yale University and entered the field again, living with and researching among, the Kapauku Papuans of West New Guinea from 1954-55 and in the summers of 1959 and 1962. In 1957 he conducted research among the Nunamiut Eskimo of Alaska and in 1962 began research among the Tirol of Austria. POSPISIL, *supra* note 24, at xi-xiii.

people actually handle disputes.⁴⁰ Second, he argues that all functioning groups of people have law, not just values or “mere custom,” but law.⁴¹ There are few anthropological or legal theories out there that offer this possibility, at least comprehensively, and it is a prerequisite for any theory to be helpful to tribes in their policymaking and lawmaking. Finally, Pospisil’s theory elements are not too generalized and go deep enough to find law where it is unwritten.

III. Our Dispute Example: James v. Smith

I have selected the Hopi case of *James v. Smith*, by way of example, as it is the first fully documented, comprehensive attempt at custom law finding in the Hopi Tribal Court.⁴² This case deals with a very common, highly charged, set of meta-issues at Hopi — the right of off-reservation Hopis to return home and make a home for themselves and the desire of long-time resident Hopis to protect the integrity of the clan and the village and to perpetuate the ceremonial cycle. At the parties’ eye-level, this is a land dispute. To make the discussion that follows clearer, I will refer in a familiar manner to the parties as Aunt Ruth and her nieces. In the tribal court proceedings the nieces sued their Aunt Ruth, and Aunt Ruth countersued her nieces to “quiet title” to a bean field in the village where Aunt Ruth wished to build a home.⁴³

40. See Pospisil’s discussion on the three traditions in legal-anthropological thinking around the problem of the definition of law:

The first tradition, which identified law with custom or norms that are somehow automatically observed without requiring leadership, legal authority, and adjudication, made the term “law” obsolete by identifying it with prescribed behavior and divorcing it from the decision-making process of authority (or group leaders). The second tradition represents a reaction to the first in attempting to define law by rigorous criteria, thus dissociating it from the body of prescriptive customs and making it an analytically meaningful concept. The failure of this tradition lied in the fact law has been defined, not on the basis of extensive cross-cultural research and experience, but in ethnocentric, narrow terms in the legal tradition of Western civilization. The third tradition, the most recent, tries to correct the extreme of ethnocentricity by moving to another extreme, that of cultural relativity. As a result, no analytical definition of law is given: only dogmatic statements concerning folk classifications and criticisms (often unjustified) of anthropologists who have designed analytical legal definitions are offered to the puzzled reader

Id. at 18.

41. *Id.* at 125.

42. *James v. Smith*, No. CIV-019-94 (Hopi Tribal Ct. Apr. 15, 1998).

43. *Smith v. James*, No. 98AP000011 (Hopi App. Ct. Nov. 16, 1999), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1999.NAHT.0000002.htm>.

This family comes from the old village of Oraibi, located on the third mesa of the Hopi Reservation in northeastern Arizona. Village history and family structure become important because the federally recognized Hopi Tribe and its courts, under tribal constitutional and common law, recognize and reinforce the traditional village land tenure customs. In *James*, that law originates with the Oraibi matrilineages. Prior to 1906, the Oraibi leaders explained and reinforced the land tenure system by ceremonially retelling the emergence and migration stories of the clans.⁴⁴ This ceremony demonstrated how it came to be that the leader of the Bear Clan is also the Oraibi Village Chief (“Kikmongwi”) and the theoretical caretaker or “owner” of all Oraibi lands.⁴⁵ As the story goes, a deity called Máasaw held the original claim to the land but upon meeting the leader of the first clan to arrive — the Bear Clan — Máasaw gave him responsibility for the land and insisted that he continue as the chief of his people.⁴⁶ The Bear-Kikmongwi selected a large plot of land near a flood plain at the base of the village, a good portion of which was then allotted to various ceremonial leaders from other clans. As new clans arrived they were allotted other lands in exchange for ceremonial or other services.⁴⁷ Finally, there was a large tract of “free land” upon which any good citizen with the Kikmongwi’s consent could farm. The test of good citizenship included frequent participation in the ceremonies and participation in communal work parties (hauling wood, cleaning springs, farming for the Kikmongwi, sponsoring dances, etc.).⁴⁸ Over time the boundaries of the various Kikmongwi, clan, and free lands were marked and were publicly known.⁴⁹ Much of the contemporary discussion of Hopi village land tenure in the literature has focused on “clan lands,” characterizing them as joint estates where land use rights are inherited within the matrilineal clan corporation.⁵⁰

44. MISCHA TITIEV, *OLD ORAIBI: A STUDY OF THE HOPI INDIANS OF THIRD MESA* 61 (1944).

45. *Id.* at 61-62.

46. *Id.*

47. *Id.* at 63.

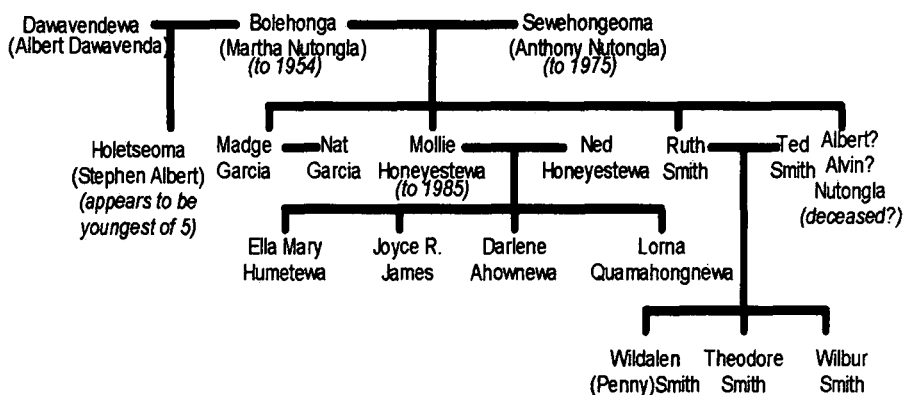
48. *See id.* at 63 fig.5 (Oraibi land holdings).

49. *Id.* at 62.

50. PETER WHITELEY, *RETHINKING HOPI ETHNOGRAPHY* 62-68 (1998) [hereinafter WHITELEY, *RETHINKING*]. Whiteley challenges the prevailing view, reminding observers that there were a number of different types of land holding and that not all clans had clan lands. Additionally, based on information provided by Hopi consultants and practices witnessed by the author, even clan lands appear to be controlled by the leading family or lineage segment that controlled a particular ceremony and were not necessarily apportioned to other decent-group members. Finally, he stresses that, in the minds of his Third Mesa Hopi consultants, clan lands were intimately connected to and reinforced by the Oraibi ceremonial cycle. When that ritual

In *James*, members of the parties' family now reside in the "new" village of Hotevilla, which was formed after the famous split of Oraibi in 1906. The implications are that this family's (and their clan's) lands were once part of Oraibi village and the newly acquired Hotevilla village lands are now held and transferred under some newer and uncertain set of Hotevilla village laws. If the Village of Hotevilla follows the old Oraibi land tenure system in some way, then it would be important to look at the family structure to determine which clanswomen had rights to which parcels of land at different points in time.⁵¹ An argument might be made that the land rightfully passes from mother to daughter to be held on behalf of the clan (some would argue that it transfers to the oldest, others argue that it transfers to the youngest). If some kind of new village law applies, then anything is possible. See the family tree in Diagram 1 below to trace the matrilineage.

DIAGRAM 1: TOBACCO CLAN FAMILY TREE
(reconstructed from court records - the birth order
is unknown within each generation)



order was broken in 1906, the justification for and reinforcement of the Oraibi clan lands system also broke. *Id.* I lay out Whiteley's characterization of Hopi land tenure in more detail before preceding Table 2.

51. Simultaneous with the final editing of this article Peter Whiteley published a comprehensive, two-part analysis of the Oraibi Split which critically reassessed both Hopi social structure and the causes of the split. Whiteley makes a compelling argument that anthropologists to date have misidentified both the composition and parameters of Hopi "clans" including the applicable land tenure rules. This is problematic because most Hopis now speak English and use the terms "clan" and "clan lands" to describe their understood land tenure system. It is also possible that past anthropological characterizations have now been internalized by younger Hopis confusing matters even further. See PETER WHITELEY, THE ORAYVI SPLIT A HOPI TRANSFORMATION 33-38 (2008) [hereinafter WHITELEY, THE ORAYVI SPLIT].

The parties' relevant family history begins in 1906 in the Village of Oraibi, when a majority of that village's population, including the parties' mother/grandmother, Martha Nutongla (Bolehonga), and her first husband, Albert Dawavendewa, left with other members to form a new village.⁵² Oraibi, before 1906, was considered to be the largest of all the Hopi villages.⁵³ Over a roughly twenty-five-year period, from 1881 to 1906, government officials and outside visitors documented increasing factionalization, predominantly between the leading clans of the village, the Spider, Kokop, and Bear clans.⁵⁴ Mischa Titiev⁵⁵ argues that weak village and supra-clan social structures could not withstand the stronger internal clan ties and motivations. He and others, such as Harry C. James, also focus on the influence of the American government, including the forced schooling of village children and attempts to move people out of their mesa-top village to individually allotted parcels in the valley below, as fueling a split between those "friendly" to American policy and those "hostile" to it.⁵⁶ A more recent study of the split conducted by Peter M. Whiteley, and in consultation with older, knowledgeable Hopi consultants, reveals a deliberate decision and plot on the part of village leaders to split their village given increased corruption in higher-order religious societies.⁵⁷ They did so, according to Whiteley, by polarizing their followers around the issue of cooperation with American education and land policy, and by invoking known

52. See Petitioners' Affidavit in Support of Motion for Preliminary Injunction at 2, *James v. Smith*, No. CIV-019-94 (Hopi Tribal Ct. July 28, 1994); Verified Petition for Injunctive Relief at 2, *James*, No. CIV-019-94 (July 28, 1994); Amended Petition to Quiet Title and for Injunctive Relief at 2, *James*, No. CIV-019-94 (Aug. 16, 1994); see also Transcript of Hearing of Mar. 22, 1995, at 13, *James*, No. CIV-019-94 (testimony of petitioner L.Q.).

53. See, e.g., HARRY C. JAMES, PAGES FROM HOPI HISTORY 16 (1974) (stating the population for 1890-91 was 903); TITIEV, *supra* note 44, at 56 ("[A]t the turn of the twentieth century, Orayvi, the only Third-Mesa village, had, by far, the largest population of the Hopi villages, accounting for at least half the total population in census records from 1885 to 1900.").

54. See TITIEV, *supra* note 44, at 69-95; JAMES, *supra* note 53, at 130-45; WHITELEY, RETHINKING, *supra* note 50, at 71-118.

55. TITIEV, *supra* note 44, at 69-95.

56. *Id.* at 71-95; JAMES, *supra* note 53, at 130-45.

57. Specifically this refers to the division of the village into two primary governance/religious factions, with the duplication of lead ceremonies and officers and the establishment of a second Chief's kiva. The analogy would be to having two U.S. capitals with two sets of congresses, supreme courts, and executives.

prophecies and predictions of such a split.⁵⁸ I will not plunge into the details of Oraibi religious politics here, but note only that our parties belonged to that part of the Oraibi village populace that came to be known as “hostile” to the U.S. government and to their seemingly cooperative village leadership. The hostiles ultimately left Oraibi in 1906 and moved on to form the new villages of Hotevilla and Bacavi.

We know from court papers and hearing testimony that the parties’ mother/grandmother, Martha Nutongla, and her first husband, Albert Dawavendewa, left Oraibi with the hostile faction on September 7, 1906.⁵⁹ Roughly six weeks later,⁶⁰ Albert Dawavendewa was arrested by American government troops, likely stemming from his role in the split and a renewed refusal to send his children to the American government boarding school. He was taken for a period of five years to either Fort Wingate prison, near present day Gallup, New Mexico, or to Carlisle Indian School in Carlisle, Pennsylvania.⁶¹ According to the parties, while he was gone, Martha remarried

58. WHITELEY, *RETHINKING*, *supra* note 50, at 243-84. A long-standing Hopi prophecy is that a long-lost brother, known as “Pahana” (some argued that this was the Americans), would return to Hopi during corrupt times to restore order. However, the hostiles publicly argued that formal recognition of a false Pahana (the U.S. government, for example) would result in the end of the world. The true Pahana was understood to return to “cut off the head” of the Hopi troublemakers and return order to the Hopi world. *Id.*

59. Petitioners’ Affidavit in Support of Motion for Preliminary Injunction, *supra* note 52, at 2; Verified Petition for Injunctive Relief, *supra* note 52, at 2; Amended Petition to Quiet Title and for Injunctive Relief, *supra* note 52, at 2; *see also* Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 13 (testimony of petitioner L.Q.).

60. Here I summarize Whiteley’s retelling of U.S. government interference after the split:

Then-Commissioner of Indian Affairs Francis E. Leupp submitted a report to President Roosevelt apparently recommending that the military be sent in to remove the “Hostile” leaders. Reuben Perry, superintendent of the Navajo Agency at Fort Defiance, was selected to take charge. Perry arrived at Oraibi on October 23, 1906 and held preliminary meetings with leaders from both the “Friendlies” and the “Hostiles”, where Hostile leaders reiterated their opposition to the schools and the white man’s way. They also requested that they be returned to Oraibi village and urged Perry to “cut the Friendly chief’s head off and end the trouble.” Perry summoned troops which arrived on October 27. Perry threatened the Hostile men with force if they refused to attend a meeting at the Oraibi Day School the next day. They complied and some Hostile men were arrested on October 28. On November 3 troops arrested the remaining Hostile men. (This is probably the round up that included Dawavendewa.) The following day, the Hotevilla camp was surrounded and eighty-two children were seized and taken to the Keam’s Canyon Boarding School. WHITELEY, *RETHINKING*, *supra* note 50, at 110-13.

61. Petitioners’ Affidavit in Support of Motion for Preliminary Injunction, *supra* note 52, at 2 (stating that Dawavendewa was sent to Alcatraz Prison near San Francisco, Cal.); *see also* Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 13 (testimony of petitioner L.Q.) (stating that he was sent to Fort Wingate near Gallup, N.M.); JAMES, *supra* note 53, at 140

to their father/grandfather Anthony Nutongla (Sewehongoema).⁶² The nieces argue that after their grandmother's first husband was taken away, she and her son Stephen Albert (Holetseoma),⁶³ the nieces' maternal uncle, began cultivating the land in dispute.⁶⁴ Aunt Ruth disagrees with this account, arguing that it was her father, Anthony Nutongla (Sewehongoema), that first cultivated the disputed land.⁶⁵ The nieces clearly wish to establish that it was their clan relatives (their grandmother Martha and their maternal uncle Stephen) that first perfected an interest in the land and that such land should continue to pass through the Tobacco clanswomen according to the custom. Aunt Ruth argues that there is a newer custom in Hotevilla that men can acquire and transfer an interest in land by cultivating it. She argues that her father first cultivated the land and then transferred it to her during his lifetime.

Observers since at least the late nineteenth century have attempted to characterize Hopi land tenure patterns into roughly four distinct categories: house sites within the village,⁶⁶ clan land,⁶⁷ land associated with ceremonial

(displaying a photograph of those arrested in Hotevilla and Shungopavi in 1906, including an "Albert Tewaventewa" who was "en route to Fort Wingate"). *But see* EDMUND NEQUATEWA, TRUTH OF A HOPI: STORIES RELATING TO THE ORIGIN, MYTHS AND CLAN HISTORIES OF THE HOPI 68 (Wilder Publishing 2007) (1936) (naming "Albert Tawaventiwa" and describing his arrest in Hotevilla after the leaders there refused to send their children to school). According to Nequatewa, Albert Tawaventiwa was diverted to Carlisle Indian School in Carlisle, Pennsylvania for five years before returning home. *Id.*

62. Petitioners' Affidavit in Support of Motion for Preliminary Injunction, *supra* note 52, at 2-3; *see also* Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 13-14 (testimony of petitioner L.Q.).

63. Hopis traditionally have a number of one-word names given to them at birth by their father's clanswomen. During the American boarding school period, starting in the late 1800s and continuing until recently, Hopi children were assigned an American first name and had their most used Hopi name pushed to a last name. Other older Hopis seem to have acquired both American first and last names, but retained use of both.

64. *See* Petitioners' Affidavit in Support of Motion for Preliminary Injunction, *supra* note 52, at 2; Verified Petition for Injunctive Relief, *supra* note 52, at 2; Amended Petition to Quiet Title and for Injunctive Relief, *supra* note 52, at 2; Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 15 (testimony of petitioner L.Q.).

65. *See* Respondent's Answer to Amended Petition to Quiet Title and for Injunctive Relief/Counter Petition to Quiet Title and for Injunctive Relief at 1-2, James v. Smith, No. CIV-019-094 (Hopi Tribal Ct. Sept. 6, 1994) [hereinafter Respondent's Answer to Amended Petition]; Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 74-75 (testimony of petitioner R.S.).

66. *See* ALBERT YAVA, BIG FALLING SNOW: A TEWA-HOPI INDIAN'S LIFE AND TIMES AND THE HISTORY AND TRADITIONS OF HIS PEOPLE 165 (Univ. of N.M. Press 1992) (1978) (app. III, "Hopi Petition to Washington"). This petition was drafted by a local non-Indian trader named Thomas Keam to Washington on behalf of 123 principals of the kiva societies, clan chiefs, and village chiefs of Walpi, Tewa, Sichomovi, Mishongnovi, Shongopovi, Shipaulovi, and Oraibi

office,⁶⁸ and village lands outside the village (“free,” “common,” or “waste” land).⁶⁹ There appears to be consensus among these observers that house sites and clan lands may only be held and inherited through the female members of a given clan (see Table 2 *infra*). However, it is unclear whether there was a consistent practice with respect to “free,” “common,” or “waste land” outside the village. There is some agreement that any person could make use of it and had a respected right to do so as long as such use continued, after which any other person could make use of it.⁷⁰ Peter Whiteley in his very recent work on the Old Oraibi Split offers an intriguing argument that the Kikmongwi (the village chief) and officers in higher order religious societies had the bulk of the best land and land use rights tied to their exercise of office but that such land did not necessarily pass within the clan after such a person died or ceased to perform the office. He also argues that only the leading family within a particular clan, the one in control of the “clan house” containing the religious objects passed down, had true “clan lands.” He seems to be arguing that everyone else could make use of free, common or waste land without the same restrictions.⁷¹ The central question in *James* would seem to be, what category of land is in dispute, land associated with ceremonial office, clan land, house site, or free land?⁷² Both sides assert that the field in dispute is not “clan land” — an acknowledgement that Oraibi clan lands in the Hotevilla area, if any, no longer exist. The question of whether the disputed land is considered a house site within the village is a difficult one given the recent vintage of Hotevilla as a village and the increase in the building of home structures in outlying areas. This question was not raised before, or addressed by, the court record in *James*. Consequently, the

villages who signed with their clan symbols. The petition described the Hopi land tenure system and urged the U.S. government to cease its effort to allot the clan lands and to institute individual, private land holding. *Id.*; see Harold S. Colton, *A Brief Survey of Hopi Common Law*, MUSEUM NOTES, Dec. 1934, at 22-23 (vol. 7, no. 6); Ernest Beaglehole, *Ownership and Inheritance in an American Indian Tribe*, 20 IOWA L. REV. 304, 306 (1935).

67. YAVA, *supra* note 66, at 165-66; Colton, *supra* note 66, at 22-23; Beaglehole, *supra* note 66, at 312-13.

68. Colton, *supra* note 66, at 22-23; Beaglehole, *supra* note 66, at 313-14.

69. Colton, *supra* note 66, at 22-23; Beaglehole, *supra* note 66, at 314.

70. Colton, *supra* note 66, at 22-23; Beaglehole, *supra* note 66, at 314.

71. WHITELEY, THE ORAYVI SPLIT, *supra* note 51, at 42-57.

72. Although the parties in this dispute cite to these observers' characterizations in their pleadings, *see, e.g.*, Brief in Support of Respondent's Claims at 4, *James v. Smith*, No. CIV-019-94 (Hopi Tribal Ct. June 26, 1995) (citations omitted) [hereinafter Brief in Support of Respondent's Claims of June 26], it must be stressed that such publications are not necessarily authoritative in tribal court absent a demonstration that they reliably document occurrences or perspectives in this particular village (Hotevilla).

court could have applied any number or combination of traditional use and transfer rules (see the host of possibilities in Table 2 below).

TABLE 2

	THOMAS KEAM & 123 LEADERS (1894) ⁷³	HAROLD S. COLTON (1934) ⁷⁴	ERNEST BEAGLEHOLE (1934/1935) ⁷⁵
Land/Use Categories	(1) House site; and (2) Field.	(1) House site in pueblo; (2) Common land lying just outside pueblo; (3) Allotted clan agricultural lands related to offices; and (4) Common grazing land outside the allotted agricultural land.	(1) House site; (2) Clan land; (3) Land associated with political and ceremonial office; and (4) Land broken in from the waste and cultivated.
House Site	The man builds the house but the woman is the owner.	Houses are owned by the women and inherited through the female line.	"If a married man builds a new house . . . [it] becomes the wife's property and descends to her daughters."
Clan Land	A man plants the fields of his wife or mother but may not dispose of them at will. Fields always remain with the mother's family.	Agricultural land allotted to the clan by the pueblo chief - A member of a clan has the right to cultivate any suitable unused agricultural land of his wife's clan or his own clan as assigned by the clan chief.	"The senior woman is the controlling agent for the land her lineage or household uses. There is reserved enough clan waste land to enable the household to shift its cultivable areas should land be flooded or sand-covered by wind."

73. YAVA, *supra* note 66, at 165 (app. III, "Hopi Petition to Washington").

74. Colton, *supra* note 66, at 22-23.

75. Beaglehole, *supra* note 66, at 306, 311, 313, 314.

Land Associated w/Office	N/A	Mentions the category but does not explain further.	Sections of cultivable land are associated with political and ceremonial office, either parts of clan land or distinct fields. These are cultivated by village-wide work parties to allow the office holder to devote all his time to his duties.
Other Cultivated Land	N/A	<p>"Unused common land outside the pueblo" - can be used for agriculture, bean patches, or peach orchards, without consulting anyone. However, the land cannot be sold or willed and again becomes common when not used.</p> <p>"Common grazing land outside the allotted agricultural land" - Anyone has a right to graze stock here, and today a man can fence it for agricultural use and at his death it reverts to his children.</p>	A man may break in land from the waste and cultivate it (with fruit trees, squash, and beans). The waste land is usually part of the village land. Upon death the land becomes village waste, or is taken over by clan relatives or by the son of the deceased. If the land goes out of cultivation during the owner's lifetime, another interested in the field may take it over.

The litigation in *James* begins with the filing of a motion for a preliminary injunction by the nieces in the Hopi Tribal Court.⁷⁶ The motion included a request that their Aunt Ruth be enjoined from going on or near the disputed property pending a final determination of rights in the land by the Village of Hotevilla.⁷⁷ The nieces claimed that their aunt was interfering with their use of the property by dividing it, attempting to fence it in, and by planting fruit trees in their bean field.⁷⁸ The trial court granted temporary injunctive relief and

76. Petitioner's Motion for Preliminary Injunction, *James v. Smith*, No. CIV-019-94 (Hopi Tribal Ct. July 28, 1994).

77. Petitioners' Motion for Preliminary Injunction, *James*, No. CIV-019-94 (July 28, 1994).

78. Petitioners' Affidavit in Support of Motion for Preliminary Injunction, *supra* note 52, at 4.

enjoined Ruth from going on or near the disputed land.⁷⁹ The nieces moved to amend their trial court petition to include a request to quiet title to the disputed parcel after receiving notification from the Village of Hotevilla recommending that this matter be handled by the tribal court.⁸⁰ The nieces then filed a petition to quiet title in their favor and to declare that they have exclusive rights to the land.⁸¹ Aunt Ruth filed an answer and a counterpetition to quiet title requesting that the court quiet title in her favor and to declare that she has exclusive rights to the disputed land.⁸² After an initial fact-finding hearing, the trial court ordered further briefing on “the Village of Hotevilla’s custom, tradition, rule or law” and set a second hearing date where the parties could call traditional experts to testify as to the applicable custom.⁸³

The nieces, who were represented by attorneys, filed pleadings containing a complex cluster of custom arguments:

Traditional Hopi family relations dictate that a man moves to his wife’s village to live in her home after marriage. Upon moving to his wife’s village, the man is a visitor/servant to the village and shall endeavor to do work for his wife and her family within the village. . . . a most common Hopi principle.⁸⁴

Another basic concept in Hopi land usage is the idea of stewardship. Stewardship requires proper attendance to the needs of the land so that the land is always abundant.⁸⁵

Hopi tradition dictates that Hopis are not to raise fences around their property. Fencing is viewed in Hopi as a means of limiting yourself and your land. Tradition further speculates that fences will eventually determine the boundaries of the White Man’s invasion, whereby the non-Indians will take all that is not fenced. Once a

79. Order to Show Cause at 2, *James*, No. CIV-019-94 (July 29, 1994).

80. Petitioners’ Motion for Leave to Amend Petition at 2, *James*, No. CIV-019-94 (Aug. 16, 1994).

81. Specifically they requested that the court “[d]eclare that Petitioners are entitled to the peaceful and quiet use of the above-described tract of land located in Village of Hotevilla and that Respondent and all persons claiming under Respondent shall have no interest in the same area of land.” Amended Petition to Quiet Title and for Injunctive Relief, *supra* note 52, at 6-7.

82. Respondent’s Answer to Amended Petition, *supra* note 65, at 6.

83. Order, *James*, No. CIV-019-94 (May 2, 1995).

84. Petitioners’ Memorandum of Points and Authorities at 3, *James*, No. CIV-019-94 (June 6, 1995).

85. *Id.* at 4.

fence is put in place by a Hopi, the extent of the land base is defined and you cannot expand in the Hopi way.⁸⁶

The thrust of their argument seems to be that, underlying each of these customs, is a principle that land use rights should be situated in the clanswoman who is in the best position to put the land to a beneficial use on behalf of the clan.⁸⁷ They further argue that Aunt Ruth forfeited her land use rights when she moved away and married a non-Hopi who did not return with her to properly tend to it.⁸⁸

Aunt Ruth, who was represented by an attorney at the trial level, filed a counterpetition to quiet title, also arguing custom but citing to written observations by outsiders:

Hotevilla does not have traditional land holdings as do other villages because of the recency of its settlement. Hopi women in general are possessors of land, however, a more recent tradition has allowed men to be possessors of the lands that they cultivate.⁸⁹

She further argued that her father gave her the land and the fact that she left the reservation at an early age and married a non-Hopi, and has not resided on the Hopi reservation for a lengthy period of time, should not preclude her from asserting her rights to it.⁹⁰ She argued that no custom requires such a result⁹¹ and that she has not abandoned the land.⁹²

The parties, by making conflicting claims with respect to Hotevilla custom, put the trial judge in a position of law finding to determine Hotevilla's current custom of land inheritance/transfer and use rights.⁹³ The nieces appear to be asserting that, although they deny the existence of Oraibi clan lands in the new village of Hotevilla as a result of the split at Oraibi,⁹⁴ some notion of custom still

86. *Id.* at 5.

87. *Id.* at 3-7.

88. *Id.*

89. Brief in Support of Respondent's Claims at 5, *James*, No. CIV-019-94 (June 16, 1995) [hereinafter Brief in Support of Respondent's Claims of June 16] (citing Colton, *supra* note 66; Beaglehole, *supra* note 66, at 314; John W. Ragsdale, *The Institutions, Laws and Values of the Hopi Indians: A Stable State Society*, 55 UMKC L. REV. 335 (1987)).

90. *Id.*

91. *Id.* at 3, 5.

92. *Id.* at 6.

93. The village of Hotevilla has never adopted any sort of statute or common law to override the traditional land system.

94. The known Oraibi "clan land" parcels, up to 1906, probably included land in areas now comprising the new village of Hotevilla and its surroundings.

applies as (1) land still passes between clanswomen; (2) a man has no interest in land except to cultivate it for his wife, mother, or sisters during his lifetime; and (3) a woman who has an interest in land can lose it if she does not live up to her obligations to family, clan, and village, suggesting some sort of reversion of interests to her sister(s) or her sister's female children.⁹⁵

The logic of the nieces' argument would go something like this: even though the clan lands system of Oraibi broke down after the split of 1906, and even where men converted empty lands to fields (at the beginning of the establishment of the Village of Hotevilla), a kind of clan land tenure persists as men are expected to cultivate land on behalf of their wives, mothers, sisters, etc. Once the man ceases to do so or dies, the land is then understood to belong to that woman's clan, to be used by the woman (or her clan members or husband on her clan's behalf). The nieces would then be arguing that their maternal grandmother, Martha, and her son Stephen, both members of the Tobacco clan, first cultivated the land on behalf of the Tobacco clan, which is also the nieces' clan. This would make all the parties, Aunt Ruth and the nieces, eligible to have use rights exclusive as to third parties. As between them, the nieces appear to be arguing that Aunt Ruth has lost her rights as she has breached her duties and obligations to her family (clan).

In opposition, Aunt Ruth appears to be asserting that under Hotevilla custom, men — not women — own the land they cultivate.⁹⁶ She argues that this is a new custom. She further asserted that it was her father Anthony Nutongla, who first cultivated the land in dispute, and that he conveyed it to her during his lifetime.⁹⁷ The question squarely before the trial judge from Aunt Ruth's

95. There is also some reference to the nieces' uncle Stephen Albert (Holetseoma) acquiring an interest in the disputed land, but this is confused with assertions that his role is also one of advisor or witness with respect to Martha Nutongla (Bolehonga)'s desires with respect to the land and her daughters. See Verified Petition for Injunctive Relief, *supra* note 52, at 3-4 (citing Notarized Statement of Stephen Albert (Holetseoma) (Sept. 1, 1993), in Verified Petition for Injunctive Relief, *supra* note 52, at Exhibit B [hereinafter Statement of Stephen Albert]); Amended Petition to Quiet Title and for Injunctive Relief, *supra* note 52, at 3-6 (citing Statement of Stephen Albert, *supra*); Petitioners' Answer to Respondent's Counter Petition at 1-2, *James*, No. CIV-019-94 (Hopi Tribal Ct. Mar. 22, 1994); Petitioners' Memorandum of Points and Authorities, *supra* note 84, at 1-7.

96. Respondent's Answer to Amended Petition, *supra* note 65, at 1-2; Brief in Support of Respondent's Claims of June 26, *supra* note 72, at 2-5.

97. Respondent's Answer to Amended Petition, *supra* note 65, at 1-2. But see Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 75 (testimony of petitioner R.S.) (testifying that she doesn't remember who started cultivating the disputed land, "but all I know was that my Dad was always there. . . . So I've always known that was ... his field, and we always ... go[t] the fruit from there."); see also *id.* at 79 (describing when her father divided the land in dispute

perspective was whether, under present day Hotevilla custom, men have some bundle of interests in the land they cultivate, and if so, whether they can transfer these interests to another?

The trial judge hearing this case was from a different village than that of the parties. He could not take judicial notice of Hotevilla's custom: "[T]he Court is unclear as to the custom, tradition, rule or law of that village as it relates to the ownership and relinquishment of land by female members of that village"⁹⁸ Consequently, after hearing testimony regarding the facts of the dispute, he ordered a second round of hearings with party selected, court-approved, traditional expert witnesses that would answer a list of party submitted, court-approved questions addressing the issue of Hotevilla's applicable custom as he had framed it.⁹⁹ After hearing from six of the nieces' and seven of Aunt Ruth's witnesses in the Village of Hotevilla,¹⁰⁰ the trial judge found in favor of the nieces:

Respondent [Aunt Ruth] has not shown the Court that she has a superior right to use and occupy the disputed land under the applicable custom of the Village of Hotevilla Petitioners [the nieces] have made such a showing IT IS THEREFORE ORDERED that the exclusive right to use and occupy the land that is the subject of this dispute belongs to Petitioners. Petitioners are hereby entitled to the peaceful and quiet use of the land.¹⁰¹

The trial judge declined to address the questions of whether only women hold interests in cultivated land on behalf of the clan, or whether some new custom had evolved recognizing that men had interests in land that they cultivated and that they could freely transfer.¹⁰² Rather, the judge focused on party conduct,

and gave half to Ruth and half to her sister Mollie (the nieces mother).

98. See Order, *supra* note 83, at 1; Minute Entry at 1-2, *James*, No. CIV-019-94 (Dec. 6, 1995) [hereinafter Minute Entry of Dec. 6, 1995]; Minute Entry at 1, *James*, No. CIV-019-94 (Apr. 16, 1996) [hereinafter Minute Entry of Apr. 16, 1996].

99. See Order, *supra* note 83; Minute Entry of Dec. 6, 1995, *supra* note 98; Minute Entry of Apr. 16, 1996, *supra* note 98.

100. It is difficult to tell from the transcript how many of these witnesses actually testified as not all individuals testifying are sufficiently identified. See Transcript of Hearing of Mar. 22, 1995, *supra* note 52. For lists of proposed witnesses, see Petitioners' Notice of Readiness for Hearing and Questions to be Propounded to Witnesses at Hearing, *James*, No. CIV-019-94 (Oct. 16, 1996); Petitioners' Notice of Amendment of Witness List, *James*, No. CIV-019-94 (Dec. 5, 1996); Respondent's Questions to Be Propounded to Witnesses at Hearing, *James*, No. CIV-019-94 (Oct. 18, 1996).

101. *James*, No. CIV-019-94, at 5.

102. *Id.* at 2-5.

setting out a rule that: (1) A person who tends to, uses, and properly cares for the land on a consistent basis and/or regularly participates in the traditional activities of the village may obtain exclusive rights to use and occupy village land;¹⁰³ (2) With respect to inheritance, land is obtained by attending to the personal needs of a person whose exclusive right it is to use and occupy such lands and/or by regularly participating in the traditional activities of the village;¹⁰⁴ (3) Any person who has the exclusive right to use and occupy land within the village must tend to, use, and properly care for the land on a consistent basis to maintain that right, otherwise any relative may then come in and use the land;¹⁰⁵ and (4) “[i]n the case of a married woman who has or acquires the right to use and occupy village land, custom and tradition requires that the woman’s husband tend to and use the land for farming purposes on a consistent basis.”¹⁰⁶

In finding for the nieces, the trial judge found that Aunt Ruth had married a non-Hopi and moved away, had infrequently returned home, and had failed to properly care for her parents (Martha and Anthony).¹⁰⁷ He also found that she failed to properly care for the disputed parcel and did not regularly participate in the traditional activities of the village.¹⁰⁸ By contrast, he found that the nieces and their mother had cared for Martha and Anthony, maintained the disputed parcel, and were regular participants in village traditional activities.¹⁰⁹

In *James v. Smith* we have a case where an off-reservation Hopi woman, Aunt Ruth, and her on-reservation, long-time resident relatives, her nieces, came to the tribal court for a declaration of who had the superior legal right to use the land in dispute. Aunt Ruth was likely fighting for her right to return home and to build a house. Her nieces felt that she had lost this right due to her long absence and from neglect of her family and by neglecting to care for the land itself. The nieces’ characterization of the applicable custom — that clan land tenure persists with the corollary that cultivated land must pass only between clanswomen — in practice functions to sustain clan and village ceremonial cycles by tying land use rights to the clan matriarchy. Both sides offered conflicting versions of custom to support their position. The trial judge held hearings to find the custom law of their village. He heard competing arguments from the parties’ traditional experts about the applicable custom. Ultimately he

103. *Id.* at 2-4.

104. *Id.* at 3-4.

105. *Id.* at 3.

106. *Id.* at 2.

107. *Id.* at 4.

108. *Id.*

109. *Id.* at 4-5.

assumed that Ruth and her sister Mollie (the nieces' mother) acquired some interests in the disputed land. The judge then applied the tests he constructed from the testimony of the nieces' experts that conditioned the maintenance of land use rights on appropriate personal conduct — specifically, caring for one's parents, making a proper use of land, and participation in village ceremonial life. Below I use the facts, arguments, and findings made in this case to explore Pospisil's basic elements of law and their implications for working with custom in general.

IV. Legal Levels & Multiple Legal Systems

*Any human society, I postulate, does not possess a single consistent legal system, but as many such systems as there are functioning subgroups. Conversely, every functioning subgroup of a society regulates the relations of its members by its own legal system, which is of necessity different, at least in some respects, from those of the other subgroups.*¹¹⁰

Nonmember judges, as well as other outsiders, may fail to see the legal structure in tribal societies below the level of the tribal councils and courts. This may also be true where member judges come from different villages or clans than the parties before them. This has to do in large part with the outsider's biases and lack of knowledge of the multiple groups and subgroups that make up any given contemporary tribal society. Pospisil would say tribal societies have multiple legal levels and legal systems.¹¹¹ He would also say

110. POSPISIL, *supra* note 24, at 98-99.

111. *Id.* at 98-99. Contemporary law and anthropology scholars call this "legal pluralism" of the early, non-ethnic type, the existence of multiple sites where law could be generated, where every social subgroup had its own internal law, such as families, clans, and communities. This is to be distinguished from at least six other types of legal pluralism: (1) colonial pluralism, asking the question whether newly independent, for example African, states would succeed in becoming unified nations given pre-existing and colonially reinforced ethnic divisions; (2) the way the state acknowledges diverse social fields within society and represents itself ideologically and organizationally in relation to them; (3) the internal diversity of state administration, the multiple directions in which its official subparts struggle and compete for legal authority; (4) the ways in which the state itself competes with other states in larger arenas (such as the EU) and the world beyond; (5) the way in which the state is interdigitated (internally and externally) with non-governmental, semi-autonomous social fields that generate their own (non-legal) obligatory norms to which they can induce or coerce compliance; and (6) the ways in which law may depend on the collaboration of non-state social fields for its implementation. Sally Falk Moore, *Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999*, in *LAW AND ANTHROPOLOGY: A READER* 346, 356 n.4, 356-58 (Sally

that within each level one will find some type of authority, advisement, or decision-making, and the principles underlying such decisions (law).¹¹² Indeed, contemporary tribal societies are comprised of a variety of kin-based, ceremonial, and secular groups, among others. Each group or subgroup has its own customs and these likely vary from group to group (subgroup to subgroup), even within the same tribe. The exception, of course, would be where either the tribal council or court has legislated or taken judicial notice of standardized customs that will be applicable to all members regardless of their group or subgroup. Such legislation or decision-making is effectively policymaking — taking “a definite course or method of action selected from among alternatives to . . . guide and determine present and future decisions.”¹¹³ The existence of multiple legal levels and systems, from a policymaking perspective, make it important to: (1) identify the relevant groups and subgroups whose members are implicated in proposed legislation or in a given decision; and (2) note any “traditional rules of jurisdiction” that might be applicable and consider deferring to the decision-making authority from that group or subgroup; or (3) if handling things at the tribal level, identify the group’s (subgroup’s) relevant custom and apply it to the group where fair and practical.

Falk Moore ed., 2004).

112. Pospisil argues that this is due to the Western observer’s tendency to default to their own Western “folk categories of law” (the system of interpretation of a particular group of human beings who participate in social events and then interpret them):

The legal thought that regards abstract rules, embodied within the coded law of civilized peoples . . . as the proper and exclusive manifestation of law, represents the major legal tradition in western Europe The origin of the emphasis on abstract rules in the legal sphere has a long cultural history and dates back to the Babylonia of Hammurabi and to the origin of the notion of natural law (c. 2,000 B.C.), a conception of law which was considered universally applicable and an abstract divine command to all mankind [A]nthropologists . . . influenced by Western legalistic tradition in general or by some legal scholars in particular, conceptualized law too narrowly, so the concept was inapplicable to primitive societies. In other words, they concluded that some societies were simply lawless.

POSPISIL, *supra* note 24, at 13, 20.

113. The *Merriam-Webster Dictionary* defines “policy” as “a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions.” MERRIAM-WEBSTER’S ONLINE DICTIONARY (2008), <http://www.merriam-webster.com/dictionary/policy>.

Pospisil also speaks of “de facto centers of legal power.”¹¹⁴ This is simply that legal level with the most enforcement power. For contemporary tribal purposes, this is the federally recognized governing body, usually the tribal council, court, and police, as opposed to those of subgroups (villages, clans, religious societies, etc.). There are two important issues to focus on with respect to the interaction of de facto centers of legal power and other legal levels: (1) when and how should the council or court enforce the decisions of traditional or local authorities;¹¹⁵ and (2) what legal remedies should the tribal council or court apply to breaches of legislated or judicially noticed custom?

Using *James v. Smith*, as an example, we can see the implications of the presence of different legal levels.¹¹⁶ If we were to inventory the multiple legal levels and systems at issue in this case, we would need to include two villages, Oraibi and Hotevilla, the clan of the parties, Tobacco (the parties are all of the same clan here), and any religious societies for which clan members have primary responsibilities.¹¹⁷ Now we ask the question, whose custom of land

114. “The center of [legal] power” is “that legal level whose authorities pass decisions that prevail in situations of conflict with similar judgments of authorities of groups from other legal levels.” In the long run, the center of power can shift, affecting “the relative amount of power at the various levels within a society, with the result that the center of power . . . may shift its position to another level.” POSPISIL, *supra* note 24, at 115, 118.

115. This has been of special concern in the Hopi tribal courts given that the Hopi Constitution explicitly recognizes the powers of the individual Hopi villages to decide matters within their reserved jurisdiction. *See, e.g., Honie v. Hopi Tribal Hous. Auth.*, No. 96AP000007 (Hopi App. Ct. Nov. 23, 1998), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1998.NAHT.0000002.htm>. *Honie* sets out an elaborate notice and hearing process for the tribal court certification and enforcement of village level decisions: (1) a village or individual may request certification, *id.* ¶ 39; (2) the trial court “must hold an evidentiary hearing” upon such a petition to determine whether notice was provided by the village authority to interested parties at the village level before the village made its decision, *id.* ¶ 36; (3) the burden is on the “petitioner or party who is requesting the trial court’s certification” to establish “by clear and convincing evidence” that the village “provided a fundamentally fair opportunity [to be heard] to all interested parties in the village decision-making process,” *id.* ¶ 43; and (4) notice of the *tribal court certification hearing* must be published in “a publication of general circulation in the Hopi jurisdiction,” be “post[ed] . . . at the village community center,” and “include the names of any known interested parties,” the location of any disputed property, and “the time and date of the tribal court’s certification hearing,” *id.* ¶ 52.

116. *James v. Smith*, No. CIV-019-94, at 2-4 (Hopi Tribal Ct. Apr. 17, 1998).

117. Indeed the Hopi Constitution explicitly recognizes multiple legal levels. *See, e.g.,* HOPi CONST. art. III, § 2 (“The following powers . . . are reserved to the individual villages: . . . (b) To adjust family disputes and regulate family relations of members of the villages. (c) To regulate the inheritance of property of the members of the villages. (d) To assign farming land, subject to the provision of Article VII.”); *see also id.* art. VII (“Assignment of use of farming

tenure are we looking for? Oraibi's? Hotevilla's? The clan's? How does the religious society, if any, factor in? The first hurdle for the trial judge in this case was to determine whether he could take judicial notice of custom reservation-wide. He could not, given that the Hopi Tribe is comprised of twelve different villages and that the judge was not from the same part of the reservation, much less the same village as the parties. Indeed, the judge here opted to hold hearings to find custom at the level of the Village of Hotevilla. All parties in *James* asserted that village level custom was applicable.¹¹⁸

However, in reviewing the pleadings and transcripts, I discovered a conflicting assertion. In the nieces' pleadings there is a reference to a potential sub-village level authority — their clan uncle Stephen Albert. The nieces claim they sought his advice on how the property should be distributed:

Petitioners [the nieces] sent a letter to [Aunt Ruth's husband] giving [Aunt Ruth], her husband and their family notice to remove the poles and trees from their land in Hotevilla. The letter further indicated that [the nieces] had gone to their Uncle Stephen (Holetseoma) Albert for advice as far back as in 1985, and he had informed them that [Aunt Ruth] had been "disowned" by her mother, Bolehonga, because [Aunt Ruth] had married outside the Hopi Tribe and had left the Hopi Reservation.¹¹⁹

Clearly, the nieces looked to their clan uncle as some sort of clan authority and were arguing, in a roundabout way, that his decision should be noted and enforced by the tribal court. Because of Uncle Stephen's unavailability as a witness due to age and ill health, his act of advisement was not considered or factored into the final decision of the trial judge on the record.¹²⁰

land within the traditional clan holdings of the villages of . . . and within the established village holdings of . . . Hotevilla . . . shall be made by each village according to its established custom, or such rules as it may lay down under a village Constitution . . .").

118. Petitioners' Memorandum of Points and Authorities, *supra* note 84, at 1-2; Brief in Support of Respondent's Claims of June 26, *supra* note 72, at 2.

119. Verified Petition for Injunctive Relief, *supra* note 52, at 5, ¶ 13. Tribal judges and scholars looking for all relevant legal levels must carefully consider the subtler assertions or the underlying assumptions of the parties, as they may not understand how to fit custom-based arguments into their pleadings in the Western law matrix and process.

120. Minute Entry of Apr. 16, 1996, *supra* note 98, at 2; Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 24-28; Transcript of Hearing of Mar. 27, 1997, at 25-30, 48, 53-56, *James*, No. CIV-019-94.

If *James* had been litigated after the Hopi Appellate Court's opinion in *Sanchez*¹²¹ in 1999, the trial judge would have faced a jurisdictional problem under the Hopi constitutional and common law. In *Sanchez*, the Hopi Appellate Court held that the doctrine of res judicata will bar re-litigation of a matter in tribal court where an appropriate clan relative has already heard and reached a final decision.¹²² The Hopi Constitution reserves original jurisdiction to the villages to regulate the inheritance of property and the assignment of farming land with respect to its members, not the tribal court.¹²³ Further, although the secular village government, the Board of Directors of the Village of Hotevilla, "waived" its original jurisdiction in this case, the appellate court in *Sanchez* interpreted "village" to include the reserved authority of sub-village, traditional authorities such as "appropriate clan relatives."¹²⁴ Here Uncle Stephen may have already decided the matter before the tribal court, thus definitively settling the issue and barring the same parties from relitigating it in tribal court. To avoid such an outcome, Aunt Ruth would have had to argue that Stephen Albert did not serve as any type of advising or decision-making authority with respect to the clan or that the scope of his traditional authority did not include the type of dispute at issue here. The "scope of traditional authority" in this sense starts to sound like subject matter jurisdiction and raises important questions concerning the types of disputes and remedies that should remain with the traditional authority and those that should lie exclusively with, or be reinforced by, the tribal court. Should the sorting of subject matter jurisdiction between traditional authorities and the tribal court be achieved legislatively? Should it be left up to the tribal judges to resolve case by case?

It is critical for tribal leaders and judges to acknowledge and accurately identify the existence of operative legal levels within their tribes. It is also critical that they acknowledge where custom is haphazardly being identified, captured, and applied without careful analysis of the impact on effected groups and subgroups. Ignoring the complexity and contradictions of concurrently operative multiple legal levels frustrates litigants, makes life uncertain for all tribal members, and causes inefficiency in secular governance. Additionally, the non-recognition of traditional authority decisions by the tribal court erodes the integrity of the traditional system and

121. *Sanchez v. Garcia*, No. 98AP000014 (Hopi App. Ct. Nov. 12, 1999), available at <http://www.tribalresourcecenter.org/opinions/opfolder/1999.NAHT.0000001.htm>.

122. *Id.*

123. *Id.*

124. *Id.*

confuses the state of the law at all legal levels. The levels should be made to correspond to each other and to be in agreement about subject matter jurisdiction. They should also be required to notify each other regarding the contours of a given authority's decision and the remedies applied. If a tribal community is committed to its customs, it should inventory its legislation and case law to see how the written law is interacting with the various traditional legal levels and legal systems and decide what the preferred relationship between these levels/systems should be.

V. The Attribute of Authority

I conclude that law (ius) manifests itself in the form of a decision passed by a legal authority (council, chief, headman, judge, and the like), by which a dispute is solved, or a party is advised before any legally relevant behavior takes place, or by which approval is given to a previous solution of a dispute made by the participants before the dispute was brought to the attention of the authority. This form of law has two important aspects: A decision serves not only to resolve a specific dispute, which represents the behavioral part played by the authority while passing the sentence, but it also represents a precedent and an ideal for those who were not party to the specific controversy. They regard the content of the decision as a revelation of the ideally correct behavior. Consequently, a legal decision may be considered a culturally important behavior insofar as the authority's act of passing his verdict (opinion) is concerned and as an ideal in its effect upon the "followers of the authority" . . . if by law is meant a form of institutionalized social control.¹²⁵

Tribal judges, even member judges, dealing with custom at some point in their work face the question of whether a particular asserted custom was/is considered legal in its natural setting or whether it was some kind of lesser

125. POSPISIL, *supra* note 24, at 37. Pospisil traces this attribute of law first to Oliver Wendell Holmes who argued that the best way to investigate law was to abstract principles from judicial decisions, and then to Karl N. Llewellyn and E. Adamson Hoebel, who explored the form of Cheyenne law by investigating that society's cases of conflict, identifying law with those principles of social control that were actually upheld in their legal decisions. Pospisil calls this "the case study approach" (in an earlier article I called this "the trouble case method"). *Id.* at 31-32 (citing OLIVER HOLMES & E. ADAMSON HOBEL, *THE CHEYENNE WAY* (1st ed. 1941)).

value or admonishment. Pospisil's "attribute of authority," is helpful in distinguishing the mere values of a group or subgroup from their operative law, especially at the sub-tribal/tribal court level. The "law" ("ius") or "custom law" of a group or subgroup exists and is effective prior to any codification in tribal legislation or in judicial opinions and orders.¹²⁶ Thus, in policymaking, it can be important to distinguish between mere group values and officially recognized group law as it sits in the traditional system. Pospisil argues that the difference turns on the presence (past or present) of an authority who acts, by advising, deciding, or approving, in a real dispute. The principle(s) invoked by the authority in the past or present to resolve a real dispute is law. These legal principles should carry greater weight than mere values in tribal legislative and adjudicative considerations.

In *James*, the asserted traditional authority, Uncle Stephen, arguably advised or made a decision at the legal level of "clan". The relevant legal principles are captured in his signed and notarized statement:¹²⁷

I own the land located in the Village of Hotevilla . . . I am granting this property to my sister Mollie Honeyestewa's children: . . .

1. As explained to me by my mother Bolehonga, . . . Ruth Smith [is] not entitled to any family property because [she] married [a] non-Hopi . . . and chose to live off the Hopi Reservation.

2. That Mollie Honeyestewa took our mother's advise [sic] and married a Hopi and devoted her lifetime to them at the Village of Hotevilla.

3. That Mollie Honeyestewa, while she was living, was the only one who took care of our mother Bolehonga, and my stepfather, Sewehongema . . . throughout their lives.

126. Pospisil distinguishes "ius", or law (the matter that forms the content of the systems of social control of the subgroups), from "leges", abstract rules. He argues that the former is living law and that the latter, while abstracting the principles of the former, can eventually result in "dead law", abstract rules that are no longer applied or enforced by a society, group, or subgroup. Put another way, "ius" means law in terms of the principles implied in precedents or rules (statutes). "Lex" or "leges" means an abstract rule, usually made explicit in a legal code (statute). Pospisil reminds us that, unfortunately, both terms translate into English as "law" but that ius is more fundamental than lex and that this misunderstanding has led some theoreticians to commit errors. *Id.* at 2, 37, 107.

127. See Statement of Stephen Albert, *supra* note 95. This statement was also submitted in Amended Petition to Quiet Title and for Injunctive Relief, *supra* note 52, at Exhibit D.

For these reasons, only Mollie Honeyestewa's children and their heirs and no other person or persons are entitled to this and any family property.¹²⁸

From the wording of the affidavit, we can distill the following principle: the right to use clan property is tied to proper conduct, including marrying within the tribe, residing on the reservation and caring for one's family.

Contrast the principle underlying his advisement/decision with more generally stated Hopi values dealing with the inheritance of land. If one asks most Hopis how they identify themselves, they will reply, "I belong to my mother's clan, from X village." Most Hopis also have a general sense that individual clan members have certain rights to use land associated with their clan. Many would go so far as to argue that land is held and passed only through the clan, which means that it can only be held and passed through the clanswomen and that men cannot hold land. From this we may derive a general Hopi value that only clanswomen may inherit and hold land. Indeed, in *James*, the nieces argued just this. If we compare the generally stated value: "women, not men, inherit and hold land" with the principle distilled from an actual decision by a traditional authority: "the right to use clan property is tied to proper conduct, including marrying within the tribe, residing on the reservation, and caring for one's family," we see that the former may be oversimplified and idealized. Uncle Stephen's legal principle is a better candidate for consideration in tribal legislation and adjudication because it was derived from a live crisis, considered by an actual traditional authority, and that authority was willing to take a stand with respect to the particular principle and outcome.

While the principles derived from traditional authority decisions or advisements may be the better candidates for formulating written custom law standards, they are difficult to find. In *James*, Uncle Stephen's decision took the form of a signed notarized statement, appearing to embody his intent to transfer property. In this statement Uncle Stephen stated that he "owns" the land and that he is "granting" the property to his sister Mollie's children. I looked past the private property language to get at his underlying concerns. One of the many difficulties in navigating the resolution of a dispute through the overlay of tribal courts onto persisting traditional systems is the confusion between Western legal concepts and process and traditional authorities and their dispute resolution powers, processes, and the principles that guide their decisions. Here I suspect that Uncle Stephen and the nieces were seeking to cover their bases by asserting the accepted traditional authority and custom

128. Statement of Stephen Albert, *supra* note 95.

principles and then by memorializing them with a quasi-Western transfer instrument — the signed, notarized statement invoking private property and transfer terminology. This is a very common dynamic seen in tribal court. The problem, though, is when should a tribal judge take such a statement (in an affidavit, will, or contract) at face value and when are there sufficient indicia that it is merely an attempt to enforce a traditional authority's decision regarding custom? In other words, did the individual signing the document intend for it to act like a transfer instrument, will, or contract, or are they using the instrument to enforce a traditional authority's application of custom at the tribal level?

The implications of the distinction between mere values and legal principles derived from the actual decisions of authorities for policymaking purposes are that it is important to: (1) identify relevant group and subgroup authorities, at least to include them as representatives in the lawmaking processes, or as traditional decision-makers or expert witnesses in the court process; (2) identify past decisions made in relevant dispute topic areas, in whatever form they might take, and the principles underlying these decisions; and (3) decide how and when the legal principles of past decisions should be codified in legislation or adjudication.

VI. The Attribute of Intention of Universal Application

In . . . tribal societies . . . , both political decisions and legal judgments are made by the same authority - the headman, the chief, or a council, as the case may be. Therefore there is evidently a need for an additional criterion that would separate the legal and political fields. The need is met by the second attribute of legal decisions, which I have called "the intention of universal application." This attribute . . . demands that the authority, in making a decision, intend it to be applied to all similar or "identical situations in the future."¹²⁹

How does a tribal judge know whether a traditional authority's decision is a one-time decision, specific to the individuals involved, or whether its legal principle was meant to apply to all clan or village members similarly situated? This matters in cases where the custom law principle is incorporated into written judicial decisions and where it may apply to future parties in similar

129. POSPISIL, *supra* note 24, at 79.

cases (where stare decisis operates). Pospisil was also concerned with separating out those decisions of an authority that are intended to apply only to one set of parties or to a particular event from those decisions where the intent is to apply the principle to similarly situated parties or similar events in general. For example, in *James*, is Uncle Stephen's guiding principle: "the right to use clan property is tied to proper conduct, including marrying within the tribe, residing on the reservation, and caring for family," intended to apply to all similarly situated members of the clan in their land disputes? If not, Pospisil would ask, is the decision legal? Pospisil argues that the authority's intention of universal application is sufficient, whether or not the authority actually consistently follows through. This distinction highlights why there will be cases where an authority's decision will not be principled and thus no "law" will emanate from it. The question to be asked then, would be "was the authority's decision principled (is the principle intended to apply to other people in similar situations) or political?" Of course, principled decisions are useful for the making of (codifying) substantive tribal law; political decisions may not be. But political decisions may be applicable in tribal level, party-specific decisions, arbitrations, or mediations.

VII. The Attribute of Obligation

*[Obligatio] refers to that part of a decision which states the rights of one party to a dispute and the duties of the other. It defines the social-legal relations between the two litigants as they supposedly existed at the time of the defendant's violation of the law. It also describes the delict, showing how the relations became unbalanced by the act of the defendant. Thus the concept is a statement about a social relationship and as such it is two directional. One direction originates in the person of the defendant, a person who by his (her, their) illegal act violated an approved relationship, thus creating on his (her, their) part a duty to correct the situation; the other direction emanates from the person who suffered a loss because of the act of the defendant, and who thus possesses the right to have the situation redressed, the right to expect an action or a sufferance on the part of the other party.*¹³⁰

As tribal members, our relationships involve significant reciprocal obligations depending on how we are related to each other. This may also

130. *Id.* at 81-82.

extend to non-biological or ceremonial relationships. Pospisil's "obligatio" comprises what many tribal members today think of as at the heart of custom law — the rules about our obligations to each other. "Obligatio" is present where an authority officially notices a specific relationship and an incident of duty and breach. In *James*, this occurs at both the clan and tribal legal levels and involves (at least and not necessarily in order) the following relationships: (1) daughter – clan; (2) daughter – father as leader; (3) child – parent; (4) clanswoman – clansmen; (5) clanswoman – husband; (5) Hopi – land; (6) husband – wife/wife's clan; and (7) clan – village.

At the level of clan, Uncle Stephen noticed Aunt Ruth's breaches in a written statement:¹³¹

Ruth [is not] entitled to any family property because [she] married [a] non-Hopi . . . and chose to live off the Hopi Reservation.¹³²

He further noticed duties and obligations met by Ruth's sister Mollie:

For the following reasons I am granting this property to my sister Mollie[s] children . . . : . . . (2) That Mollie . . . took our mother's advise [sic] and married a Hopi and devoted her lifetime to them at the Village of Hotevilla. (3) That Mollie . . . , while she was living, was the only one who took care of our mother Bolehonga, and my stepfather, Sewehongeoma, . . . throughout their lives.¹³³

Similarly, at the level of the Hopi Tribe, the trial judge found that the nieces had shown that they had met their duties and obligations where their Aunt Ruth had not:

131. Recall that at the level of the village, the Hotevilla Board of Directors declined to handle the dispute. Amended Petition to Quiet Title and for Injunctive Relief, *supra* note 52, at Exhibit C (Letter from Hotevilla Village Board of Directors) ("Since there are many issues that will need to be addressed by legal advocates, it was recommended that this dispute be handled by the Hopi Courts.").

132. Statement of Stephen Albert, *supra* note 95; *see also* Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 18-19 (LQ's testimony that shortly after her mother died in 1985 there was a family meeting to discuss who would get her plaza house where her Uncle Stephen "told [Aunt Ruth] that [she] was disowned by [her] mother when [she] married other tribes and [she was] not entitled to anything"); *id.* at 51 (JJ's testimony regarding the same meeting and Uncle Stephen's statements prior to it that "Because [she] married outside the tribe, [she was] to get nothing"); *id.* at 24-25 (LQ's testimony that after her Aunt Ruth put up poles on the disputed property she told her Uncle Stephen and they recorded a discussion of the family history, including a discussion of the disputed land and interests in it).

133. *Id.*

Respondent [Aunt Ruth] has not shown the Court that she has a superior right to use and occupy the disputed land under the applicable custom and tradition of the Village of Hotevilla . . . Petitioners [the nieces] have made such a showing.”¹³⁴

He contrasted the nieces conduct with that of Aunt Ruth:

Petitioners, who always have lived on the Hopi Reservation, have used and cared for the land, tended to the personal needs of their grandmother-Respondent’s mother-until her death, and maintained regular participation in the traditional activities of Hotevilla. . . . For many years, Petitioners have planted beans on the land. . . . Petitioners have made very good use of the land.¹³⁵

Respondent left the Hopi Reservation in 1938. She has maintained a residence since that time on her husband’s reservation. She occasionally has visited the Hopi Reservation but her visits have always been for short periods of time. . . . Although Respondent has planted fruit trees on and fenced in part of the disputed land, these actions are not enough under the applicable custom and tradition to give Respondent a right to use and occupy the land superior to the right of Petitioners. Moreover, Respondent’s husband, since his marriage to Respondent, never has consistently tended to and used the land for farming purposes.¹³⁶

In making these findings the trial judge set out and applied a rule for breach of duty. The rule initially assumes that a person has an interest in village land, but that where such a person (1) fails to notoriously “tend to, use, and properly care for the land on a consistent basis;”¹³⁷ or (2) where that person is a woman, the woman’s husband fails “to [notoriously] tend to and use the land for farming purposes on a consistent basis;”¹³⁸ or where such a person (3) fails to “regularly participate in the traditional activities of the village,” he or she may lose that interest.¹³⁹ If such a person loses his or her interest, any relative may come in and use the land.¹⁴⁰

134. *James v. Smith*, No. CIV-019-94, at 5 (Hopi Tribal Ct. Apr. 17, 1998).

135. *Id.* at 4, 5.

136. *Id.* at 4.

137. *Id.* at 3, 5.

138. *Id.*

139. *Id.* at 5.

140. *Id.* at 3.

The trial judge also qualified “proper use or care” and “farming purposes” to include at least the planting of specific types of crops important to the Hopi ceremonial cycle. The judge noted that for many years, the nieces had planted beans on the land:

To the Hopi, the planting of beans is very important, for beans are used for ceremonial purposes as well as for food. ‘Powamuya’ -- the Bean Dance -- is directly tied to the planting of beans. Thus, by planting beans, Petitioners have made very good use of the land.¹⁴¹

By crafting the rule in this way and by taking judicial notice of the significance of planting beans and the bean dance, the trial judge formally tied land use rights to a duty of ceremonial participation.

However, while the trial judge here was careful to identify the breach and to construct a rule and remedy for such breach, there was more he could have said about the underlying relationships and their corresponding duties. Why is it important that a Hopi woman (or her husband) support ceremonial undertakings? Does her access to and use of land impact the ceremonies one way or another? Whose interests do the ceremonies serve (the village, the clan (which clan?), and/or the individual)?

A close inspection of a woman’s rights with respect to land, as documented by outside observers, reveals that such rights are tied, at a minimum, to her duties to support the ceremonial functions of her husband and clansmen. Such duties have been noted and commented on by anthropologists since the nineteenth century:

Women . . . participate [in the religious life of the village] by washing and dressing the husband’s hair on all ceremonial occasions and by bringing food to Katsina dancers at the noon rest period. During many observances the women are required to prepare special foods which must be brought to the kiva in prescribed vessels at definite times, and the sacred cornmeal which is used in all rituals must be ground by women.¹⁴²

141. *Id.*

142. TITIEV, *supra* note 44, at 16. There appears to be a dearth of scholarship capturing the role and duties of women throughout a lifetime in both the life of the clan and the village ceremonial cycle. Another glaring omission is a detailed analysis of the reciprocity between women in support of these happenings, as a form of currency and as the foundation making lifetime and village ceremonials possible. Dare I say that men must have done the bulk of the observing, note-taking, and analysis, probably while they sat happily eating their nōqkwivi

However, equating the duties of women with the mere provision of meals would grossly underestimate the importance of their role in the family, clan, and village, if for no other reason than that, in the early years, a Hopi woman might spend an average of three hours a day grinding corn!¹⁴³ Most ceremonies involve the preparation of traditional meals for large groups of people and exchanges of large quantities of food.¹⁴⁴ The preparation of traditional food is expensive, time consuming, and requires years of training. Further, a review of any of the well known Hopi autobiographies would inform the reader of the many critical offices, functions, and skills performed by women from birth (baby naming), initiations (for girls and boys into the Katcina and Powamu societies and for young men into the Wuwutsim society), puberty rites (corn grinding for girls), marriage (hair washing), death (preparation of the body for burial), and of course, ongoing participation in the annual village ceremonial cycle,¹⁴⁵ the women's societies, and for office holders, as officials in any number of major and minor ceremonies.¹⁴⁶ Add to this the fact that women have duties, not only to their own husbands and children, but also to the children of their clanswomen, and to their ceremonial children as well. From the female perspective, without their efforts, clan

(hominy stew) and piiki bread at some Hopi woman's table.

143. For a good description of responsibilities surrounding food at Hopi, see RICHARD MAITLAND BRADFIELD, *A NATURAL HISTORY OF ASSOCIATIONS* 20-25 (1973).

144. For example, in a Hopi wedding, truckloads of homemade bread, traditional foods, and other foods are exchanged.

145. Hopis have an elaborate annual ceremonial cycle. I sometimes describe it as the equivalent of having seven or so full-blown Christmas holidays in a year (in terms of time, labor and significance). There are seven "great" ceremonies held in a theoretical full cycle: (1) Wuwutcim (young men's initiation (every four years)); (2) Soyal (re-admission of the Katcinas (ancestors) to the village (annual)); (3) Powamuya (preparation for a successful growing season (annual) and children's initiations into Katcina and Powamu societies (every four years)); (4) Niman (homegoing of the Katcinas (annual)); (5) Snake-Antelope (every two years) or Flute (every two years); (6) Marau (women's society); and (7) Lakon or Oaqol (women's societies). Practically speaking, these involve a series of kiva rites, night dances, day/plaza dances, and other performances and/or visits to shrines in Hopi country. See generally BRADFIELD, *supra* note 143, at 46-63 (describing in detail the Hopi worldview and ceremonial cycle). Dances in the summer involve the whole village with Katcinas numbering anywhere from thirty to over one hundred, with spectators from other villages (and from all over the world). Being a Hopi actively engaged in the ceremonial cycle is a great deal of work, and one is obligated to assist those who offered their assistance in the past. *Id.*

146. See generally HELEN SEKAQUAPTEWA, *ME AND MINE: THE LIFE STORY OF HELEN SEKAQUAPTEWA* (Louise Udall ed., 1969); POLINGAYSI QOYAWAYMA (ELIZABETH Q. WHITE) AS TOLD TO VADA F. CARLSON, *NO TURNING BACK* (1964); DON TALAYESVA, *SUN CHIEF: THE AUTOBIOGRAPHY OF A HOPI INDIAN* (Leo W. Simmons ed., 1942).

events and village ceremonies would not be possible.

In the hearing transcripts from *James* below, one of the nieces and two of the nieces' expert witnesses stressed the importance of women's duties with respect to land:

Transcript Excerpt 1

Nieces' Counsel: And what was your mother [Mollie] doing in terms of the land?

Niece LQ: I guess basically taking care of her mother and father and doing a lot of things for our grandfather, because he was one of the Mongwis [leaders] in the village. She did all the preparation for the kiva, to take food to the kiva for him. When things were going on. He was an initiated member of the Hopi religion. He was also of the Spider clan, which is considered one of the leader clans in the village. He was also keeper of the kiva there because that belonged to the Spider clan. And so she did all of these things after she came home¹⁴⁷

Transcript Excerpt 2

Nieces' Counsel: Speaking of taking care of the parents, family members that take care of their parents, what do they get rewarded?"

MS: They are entitled to the things that the other has. The girls, the daughters are entitled to the mother's belongings and the properties, if they stay on the village to take care of their parents.

147. Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 17.

Nieces' Counsel: So . . . if . . . Ruth married outside and left, Mollie married a Hopi man and remained in the village and the husband came and lived at Hotevilla . . . in your understanding of how things have transpired, would Mollie then have a better right to [her mother's] things?

MS: Yes.

. . . .

Nieces' Counsel: Why?

MS: . . . Because she stayed and married a Hopi the way her mother wanted her to. And she took care of her parents. And their father was . . . chief in one of the kivas that takes on in January. When the father gets into that kiva to do that, she does everything for him. For the father. She takes care of the father, what needs to be done in the kiva. And she cooks for the father. And everything that she's doing, she is entitled to things. 'Cause she stayed there to take care of her parents.¹⁴⁸

Transcript Excerpt 3

A second of the nieces' traditional expert witness concurred upon being questioned by the trial judge:

Judge: Puma sen it a'ni Hopihihta hintsatskyangwu
They perhaps are active in Hopi things

Pu' pam sen yep...
Then she perhaps ...

Pam pumuy a'ne tumala'ytangwu
She works hard at taking care of them

Amungam hihta hintsakngwu sen.
Perhaps she does things for them.

148. *Id.* at 39.

Pay naakwayhihta, noovat, hiihihta enang.
Bringing ceremonial food, and other things.

Pu' pam put aw tumala'ytaqw
(When) she does this work

sen pi taahamat,
maybe her uncles,

sinomat angam aw hin wuuwaye'
(or) other relatives consider this on her behalf

Pu' sen put haalaytote
Maybe they appreciate

Pu' sen put maqayangwu hihta'a
Then perhaps they would give her something.

Pu' sen pam wuhti sen naamahin yaapiqw
sinomu'ytangwu,
Perhaps this woman has relatives here,

Paavamu'yta,
Older brothers

Tuupkomu'ytangwu
Younger brothers/sisters

Timuy . . .
Children

Mömu'ytangwu
grandchildren(maternal)/nieces/nephews

Pu' puma sen it Hopi hihta naat a'ni hintsatskyaqw
Then they perhaps these Hopi things are they still active
in them

Pam pumuy qa pa'angwantaniqw,
If she does not support them,

Pam sen pahsat put tuutskwat himu'ytangwu.
does she still have ownership of the land.

Turta nu' put umuy piw tuuvingta.
Let me ask you all again.

HD: Pay pi ayan, ah- antsa ima hiihihta wiiwimkyamnoqw
Well now in this way — those who are initiated into
these things

Antsa tavi'ytaqa pi put maqsonlawngwu,
The one who is caretaker makes a great effort,

Niiqe angam hihta . . .
It is so, doing things for (him/her)

Me ima hiihihta ang naakwayit hintsatskya
See they are doing the things for bringing ceremonial
food

Hiihin ima put tuwi'yungwa.
The different ways of doing these things.

Niiqe pam tavi'ytaqa
Therefore the caretaker

Pu' pam put maqsontangwu.
She/he puts out a lot of effort.

Hihta wimkyat tavi'ytaqa.
Someone who cares for an initiated one.

Pam sutsep put maqson-
They are always putting out this effort

Noqw antsa hiita himu'taqw pay kur hakniqw
But if there is anything he has

Pay kur hakniqw qa pamni,
It cannot be anybody else,

Is pi pam maqsontangwu
Because they put out the effort.

Pu' kya as antsa qööqayta,
Perhaps there is a sister,

Tuupkoytaqw pam pay put-
Or younger brother/sister he/she-

Haqam qatu' qa amum put hakiy maqsonlawngu
They live away in another place they are not there with

them to put forth this effort.

Pam pay qa hihta nanvotningwu
He/she does not have any knowledge of this thing (the
effort)

Noqw pu' i' yaapiqw tavi'ytaqa pam . . .
Therefore this one who is here taking care,

Pam hihta aw pítuqw pu' hakim it angam yahntotingwu . . .
When something comes up we do these things for
him . . .

Páasat pam put it hihta naakwayit angam hintsakngwu.
Then at that time he/she brings ceremonial food on
(his/her) behalf.

Nuy noq oovi pay hihta himu'ytaqw
In my opinion therefore, if this person has something

Pay kur hin qa pam put hihta himuyatningwu
There is no one else but him/her to get his things.)¹⁴⁹

It is clear from the combined testimony that, for a woman, the duties of “taking care of” one’s parents and “regularly participating in the traditional activities of the village” are intertwined and involve significantly greater training, skill, and consistent life-long effort. In answer to the question “what was your mother doing in terms of land,” Niece LQ refers to her mother Mollie’s duty to undertake preparations (food and otherwise) for her father who belonged to one of the “leader clans” and who had the responsibility to be “the keeper of the kiva.” The nieces’ traditional expert witness, MS, also referenced this duty when she states that “When the father gets into that kiva . . . she [Mollie] does everything for him She takes care of the father, what needs to be done in the kiva. And she cooks for the father.” The second of the nieces’ experts, HD, testified in the Hopi language stressing the significant, ongoing nature of the duty: “The one who is caretaker makes a great effort . . . bringing ceremonial food . . . They are always putting out this effort.”¹⁵⁰ A thorough analysis of the obligation in *James* would include identification of the relationship (between Ruth and her father, both daughter-

149. Transcript of Hearing of Mar. 27, 1997, *supra* note 120, at 15, 17-18.

150. *Id.*

father and Hopi daughter-father as village leader), the duties owed (to support and participate in her father's ceremonial duties to the village) and breached (Ruth's long absence and non-support/participation), and the expected remedy (no right to use family (clan) lands).

Written tribal court opinions and orders should document all aspects of the obligatio that would otherwise be oral in the traditional system. They should also clearly discuss the values underlying deciding principles, both to justify the outcome in that case and to determine whether they are likely to be applied in future, similar cases. In policymaking we should care about the presence of obligatio, if we care about reinforcing certain types of relationships and the duties and obligations that go with them. It is important to identify: (1) relationships that should be fostered and reinforced; (2) the duties owed and by whom; (3) the corresponding rights and who has them; (4) the underlying value(s) at issue; and (5) the losses likely suffered upon breach and how they were (or should be) addressed. For more traditional tribes it may also be important to ask whether these duties and obligations involve primarily the interests of living individuals and whether, in the traditional system, there were secular, in addition to, or instead of, supernatural sanctions. These latter two questions are concerned with whether a tribe wishes to apply man-made remedies or sanctions to back religious custom law.

VIII. The Attribute of Sanction

[I]t follows that sanction, on one hand, is a necessary criterion of law and, on the other, that it need not consist of corporal punishment or a deprivation of property (physical sanctions). The form of legal sanctions is certainly relative to the particular society or to the particular subgroup in which it is used; it may be physical or social-psychological. I may, then, define legal sanction either as a negative device in withdrawing rewards or favors that otherwise (if the law had not been violated) would have been granted, or as a positive measure in inflicting some painful experience, physical or psychological.¹⁵¹

For Pospisil any kind of sanction, enforced by an authority, by society in some way, or supernaturally, indicates the presence of law, what I am calling custom law. The one caveat is that supernaturally applied sanctions lie in the realm of religious law. Contemporary policymaking takes place in the realm

151. POSPISIL, *supra* note 24, at 92.

of the secular, and so we are concerned here with identifying traditional, human-applied sanctions, that may have been (or may be) applied in addition to supernatural sanctions. However, the “attribute of sanction” is always the most difficult to characterize in any given culture. This is so because sanction and worldview are intertwined in complex ways. I continue with the Hopi example.

We are fortunate at Hopi that much work has been done to document the experiences, perspectives, and knowledge of Hopis and Tewas from at least the time of our great-great grandparents. Much of this work has been done by anthropologist(s) of both the classical “scientific” bent and, later, ethnographers with a sincere concern to capture Hopi insider understandings. According to Whiteley, before 1906 in Old Oraibi our people were divided into two general classes with respect to access to knowledge. Whiteley has written extensively on the power of the elite “pavansinom” versus the common Hopi kept in the dark, the “sukavungsinom”:

Power is fundamentally equated with elite access to specialized secret knowledge that enables the bearer to induce significant transformations in the world. Ritual knowledge is the ‘strategic resource’; material entities are not the medium of power differentials. The structure of ritual leadership is simultaneously the structure of political leadership. Political actions on the part of the pavansinom is homologous with, and ultimately inseparable from, ritual action: secretive and conspiratorial, and directed towards the planning of society’s future. Ritual has an instrumental mode that transforms the world’s conditions. Coercion mostly takes a supernatural form, and consent to authority is based on fear of supernatural sanctions. Explanation of marked societal events identify deliberate execution of joint elite decisions toward preconceived ends.¹⁵²

Whiteley references “fear of supernatural sanctions” or “maqastutavo” (“fear teaching”) as the primary doctrine prescribing adherence to norms.¹⁵³ In this segment Whiteley alludes to the split at Oraibi, and other ancient villages, where leaders (pavansinom) are said to have orchestrated the destruction of villages by inciting internal conflict or by inviting attacks by outsiders, justified as consistent with prophecy.¹⁵⁴ In more mundane matters, villagers

152. WHITELEY, *RETHINKING*, *supra* note 50, at 102-03.

153. *Id.* at 95.

154. *Id.* 93-97.

were, and many still are, afraid to transgress norms lest they or a relative should become sick or die.¹⁵⁵ Even so, there were occasions when corporal punishment was threatened or meted out by disciplinary Katcinas who used yucca whips to encourage compliance.¹⁵⁶ But perhaps more frequent today are the public demonstrations and outings of misbehavior that occur in most villages each summer through clowning:

[T]he two-day clown ceremony . . . Clowns represent mankind in a pre-moral state, where basic Hopi values - self-control in eating, decorous and respectful interpersonal relations, nonaggression, nonacquisitiveness, noninquisitiveness, sexual modesty, etc. - are overturned, reversed, and burlesqued in the typical fashion of inversionary ritual. Hopi clowns are gluttonous, uncouth, aggressive, grasping, intrusive, prying, obscene (and extremely funny). This part of their purpose: to stand the world on its head in order to reveal its rules and their necessity against chaos. The Warrior Katcinas, as the clown's adversaries, represent the moralizing influence of prescribed behavioral values and the upholding of these with severe supernatural sanctions. Eventually, the clowns are stripped, doused with gallons of water, whipped with willow branches, and forced to go through what amounts to a public confessional, before reintegration into their everyday social identities.¹⁵⁷

What Whiteley does not convey here are the changing characters and topics of misbehavior that the clowns enact each year. They often mock real people and re-enact actual events. In years past I recall the re-enactment of the alleged exploits of the tribal treasurer who had been accused of embezzling tribal funds. A clown wearing a name tag designating him "treasurer," with bottles of liquor hanging out of his pockets, drove a car painted with the words "tribal vehicle" into the plaza, escorted by two "ladies of the evening" clowns. Let's just say everyone knew who and what this was about, and we soon had a new treasurer.

At Hopi we have a complex persisting set of traditional sanctions, religious and secular. Maqastutavo persists and influences peoples' actions but equally effective is the making of examples of bad behavior with all the attendant chastisement and public ridicule. Some breaches of norms, such as that one

155. *Id.* at 95.

156. *Id.* at 96.

157. *Id.* at 98-100.

should be respectful and sober during the ceremonies, are sanctioned by both the traditional and tribal systems. For example, if one is out of line during a ceremony, he or she may be publicly chastised by the disciplinary Katsina; the tribal police may be called to arrest that person for violating the criminal code provision making it a crime to be disrespectful or drunk at the ceremony, and punishable with a fine and/or jail time.¹⁵⁸

In the area of land use rights and the duties and obligations owed with respect to land, we are still exploring the diverse local understandings. My best guess, without taking traditional expert testimony on the global question, is that our families, clans, and the wider village communities suffer from functional and/or supernatural outcomes (sanctions), where we cannot get along to make our ceremonies go. For example, where we cannot cooperate to plant or harvest at the right intervals to catch the rain or where the rain simply won't come, or even where the corn is plentiful, we might not be able to cooperate to organize and hold the full ceremonial cycle because we are busy fighting over homes and fields. These functional and/or supernatural sanctions are reinforced by our clan uncles when they arbitrate¹⁵⁹ intra-family (clan) home/land disputes and say which dutiful clan member(s) have the superior use rights. Where family members continue to fight and refuse to live with the decision of their clan uncles, or where they do not have a clan uncle who can or will arbitrate, they may go to tribal court to seek formal tribal recognition of superior use rights. As can be seen in the James case, the tribal court under the present state of Hopi law will attempt to stand in the

158. HOPI LAW & ORDER CODE tit. III, §§ 3.3.91 (1991), available at <http://www.narf.org/nill/Codes/hopicode/title3.htm> ("Any Indian who willfully disturbs . . . any meeting for religious or ceremonial purposes, by any act, gesture or utterance . . . is guilty of an offense"); *id.* § 3.3.92 ("Any Indian who shall enter a kiva, ceremonial building or ceremonial area during the time of a religious or ceremonial activity while under the influence of alcohol . . . is guilty of an offense.").

159. I use the term "arbitrate" loosely here. I am dissatisfied that what I am seeing where a clan uncle or "taaha" advises disputing family or clan members is anything like mediation. He is not sizing up the respective positions and liabilities of the parties and putting pressure on them to compromise. This also is not a talking out process, like that popularly characterized in peacemaking models. Rather, the process seems to approximate a forceful reiteration of relationships and responsibilities with such strong advisement that it approaches a made decision. The "sanction" element comes from family/clan member and broader village/tribal member recognition of the advisement or decision or an ongoing "retelling of the reasoning of it" to the point where the person in breach pays a social price for persisting in their position (embarrassment, fewer and fewer people will deal with them, no reciprocity when they need provisions or assistance in personal, familial/clan, or village ceremonial events). It is uncommon for persons in breach to stand their ground for long under these circumstances.

shoes of the village or clan uncle, by applying its version of the local custom or by reinforcing the made decision of the clan uncle. In this way, breach of duty with respect to land is sanctioned at the supernatural, clan, and tribal legal levels. This may take the form of bad weather for crops, community recognition and reinforcement of the advisements and decisions of traditional clan authorities — resulting in people talking badly about, or refusing to deal with the person in breach¹⁶⁰ and with the secular state-like enforcement mechanisms of the tribal government. For example, an enforceable court order recognizing that a specific person has superior and exclusive land use rights might result in the authorization of the tribal police to evict future trespassers.¹⁶¹

The important considerations for policymaking purposes with respect to sanction include: (1) What were/are the traditional sanctions and when should they apply; (2) Whether the traditional sanctions are sufficient or whether tribal sanctions “backing them up” are desired; (3) Whether innovative tribal sanctions of a nature similar to traditional sanctions are desired, such as outing bad behavior in the tribal newspaper for example; and (4) When and how tribal courts and police should recognize and enforce the decisions, remedies, and/or sanctions issued by traditional authorities?

160. There are also very likely sanctions meted out by religious societies and/or their traditional authorities. However, this discussion would venture into the realm of religious law, a topic not addressed in this article.

161. I disagree in part with Robert Porter, where he argues that the Western adversarial process amplifies and perpetuates fighting among tribal members, fragmenting relationships, and offering no process for repair of long-term relationships, thus threatening, at some level, tribal sovereignty itself. Porter, *supra* note 8, at 274-76. Rather, I find myself arguing here for Western-styled enforcement mechanisms backing either the decisions of traditional authorities or the decisions of tribal judges standing in their shoes to stop incessant fighting over homes and land on the Hopi reservation. These are very old fights that may have been through multiple rounds (at least in each generation) of traditional dispute resolution and sanction. Hopis have been fighting over property from the beginning and those bucking applicable norms and sanctions have often opted to leave - still a difficult undertaking. Perhaps the Western system offers a way to settle expectations with finality and enforcement. It is my hope that we will be able to initiate legal reforms to better secure property interests, at least for the duration of an individual's lifetime. Even so, I do not argue for a wholesale importation of Western process and property law. It must be thoughtfully tailored by skillful stakeholders to meet Hopi needs and priorities. The ideal Hopi justice system would include both an adversarial process tailored to accommodate our customs and traditions, with an annexed alternative dispute resolution process such as mediation — not a wholesale repudiation of the former for the latter.

IX. Justice

*[J]ustice [is] either the conformity of the values of legal principles with basic jural postulates or as a degree of social internalization.*¹⁶²

The central question is whether it is just for tribal governments to reinforce custom law with legislation, court orders, and law enforcement where not everyone subject to the law shares the same values. This may be the case where a number of different culture groups reside on the same reservation, where nonmembers or non-Natives have married in, or where they have children with members. It is also the case that growing numbers of members themselves have acquired Western, individuated, rights-based expectations. In many tribes, female members also seek to change their role and their rights from the traditional or generally accepted ways. The problem then is how tribes may reinforce and promote custom while simultaneously protecting the rights of those who do not share the traditional value system or who seek to change it.

In the opening quote, Pospisil reads “jural postulates” to mean values shared by the group.¹⁶³ He would find those principles in decisions made by authorities to be just where such principles conform to the values shared by the majority of people in that group.¹⁶⁴ Contrast this view with that of the United States Congress, which has legislated very specific contours for what it means by justice, for example, that “[n]o Indian tribe in exercising powers of self government shall . . . (1) make or enforce any law prohibiting the free exercise of religion . . . ; (5) take any private property for a public use without just compensation; . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law”¹⁶⁵ Pospisil would test the justice of custom law by confirming whether or not a majority of the people governed by it supported it. Under this formulation, there would always be a minority of people who would be subject to the custom law but who did not agree with its underlying principles. The U.S. Congress, on the other hand, through the Indian Civil Rights Act (ICRA), seeks to require that all people governed by a tribe be guaranteed certain specific and equal rights under tribal law. It should be

162. POSPISIL, *supra* note 24, at 272 (citations omitted).

163. *Id.* at 265.

164. *Id.* at 270.

165. 25 U.S.C. § 1302(1), 1302(5), 1302(8) (2006).

clear that many, if not most, custom law principles would not survive a test for justice based rigidly on free exercise and due process rights or protection of private property and equal protection.¹⁶⁶

The principles applied in the trial court order in *James* appear to violate the ICRA in at least four different ways. Aunt Ruth could have argued that the principles as set out, or as applied, violated her free exercise rights, resulting in a taking of her private property without due process or just compensation, and that the re-stated custom law principles deny her equal treatment as a married woman with respect to maintaining her property rights. While no federal court review is available under U.S. law to remedy such violations absent a viable petition for a writ of habeas corpus,¹⁶⁷ the tribal legislature, appellate body, and community will have a keen interest in weighing whether potential or actual ICRA violations warrant a modification of the applied custom law principles to meet new understandings of what should be considered “just” in the contemporary tribal community. Alternatively, there may be central traditional principles or values so important to the integrity of the community, its religion, and/or its economy that majority support for them is enough, even when they are applied to dissenting minorities. Even discriminating laws within the U.S. system are legal where there are important or compelling governmental interests that are being pursued. In any case, this is a policy debate to be undertaken by tribal citizens and their leaders.

A. Free Exercise Rights

In *James*, the trial court’s re-stated custom law principle ties the maintenance of individual property rights (exclusive lifetime use rights) under Hopi law to a requirement that a person “regularly participate in the traditional activities of the village.”¹⁶⁸ Aunt Ruth argues that her father divided the land and gave her and her sister Molly each a half of a parcel of farming land in

166. See Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 835-48 (2007) (arguing that it is a mistake on the part of contemporary liberals to impose liberalism on indigenous groups, specifically by imposing a one-size-fits all approach to civil liberties via the Indian Civil Rights Act as this would destabilize tribal government and destroy tribal culture and Indian differentness).

167. 25 U.S.C. § 1303; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that federal court civil action against a tribe is barred by the sovereign immunity of the tribe and that the ICRA provision providing for federal habeas corpus relief to test legality of person’s detention by a tribe does not constitute a general waiver of a tribe’s sovereign immunity from suit).

168. *James v. Smith*, No. CIV-019-94, at 2-5 (Hopi Tribal Ct. Apr. 15, 1998).

Hotevilla Village when he was alive.¹⁶⁹ The trial court assumes that she has some interest in this parcel of land but re-states a rule that her interest is subject to divestment where she has married a non-Hopi, moved away for many years, and has failed to return home to regularly participate in the ceremonies.¹⁷⁰ Aunt Ruth could argue that she has an ICRA right to the free exercise of religion in that she chooses not to participate in the village ceremonials. Further, any tribal law that penalizes her liberty and property interests for this choice is unjust and should not be legal or a part of the secularly enforced tribal law.

B. Right Against the Taking of Private Property without Due Process and Just Compensation

The trial court's application of the re-stated custom law principles in *James* to the dispute between Aunt Ruth and her nieces results in a finding of exclusive property use rights in the nieces, subjecting Aunt Ruth to potential court-ordered, police enforced eviction should she attempt to occupy or use the disputed parcel. The effect of the trial court order is to divest Aunt Ruth of any property rights in the disputed parcel. She may argue that the way the trial judge came to find, re-state, and then apply custom law principles in her case resulted in a taking of her private property without due process and just compensation under the ICRA. Again, she would be arguing that this result is unjust and that such a process and outcome should not be legal or a part of the secular tribal law or enforced by secular tribal law enforcement.

C. Right to Equal Protection Under Tribal Law

Another rationale for finding that Aunt Ruth had lost her exclusive land use rights in the disputed parcel appears to be that her husband had never cultivated the disputed land, particularly in ways that supported her father's participation in the village ceremonies. Recall the trial judge's re-stated rule that: "[i]n the case of a married woman who has or acquires the right to use or occupy village land, custom and tradition requires that the woman's husband tend to and use the land for farming purposes on a consistent basis."¹⁷¹ Ruth could argue that the trial judge's found, re-stated, and applied custom law principle unfairly burdens married women and makes it harder for married women to preserve their property rights. Why should married women be

169. Respondent's Answer to Amended Petition, *supra* note 65, at 1-2, 5; *see also* Transcript of Hearing of Mar. 22, 1995, *supra* note 52, at 78-80 (testimony of petitioner R.S.).

170. *James*, No. CIV-019-94, at 2-5 (Hopi Tribal Ct. Apr. 17, 1998).

171. *Id.* at 2.

treated differently from single women and married men, and how does a married woman protect her interests if her husband will not cooperate? The special “married woman’s rule,” absent a “married man’s rule,” would appear to violate the ICRA’s equal protection under tribal law requirement. Ruth again could argue that tribal laws discriminating on the basis of sex are inherently unjust absent the furthering of important or compelling government interests.

Both the reinforcement of custom and the pursuit of justice are about accountability of tribal leaders to tribal memberships. Whether the majority of a membership shares and chooses to reinforce a particular traditional value or whether the majority expects Western-styled individual rights is always shifting with respect to any particular topic. Group sentiments should be measured on an ongoing basis. Considerations of justice, with respect to custom, argue for the dedication of time, attention, and funding to carefully determine applicable local custom law principles and the degree of acceptance of such principles within the group to be bound by them. This should include public notice and input by the members of the group to be bound by custom law principles before such principles are incorporated into legislation or as part of an adjudication. This will likely require special processes in tribal law for the drafting and adoption of legislation and for custom law finding in tribal court. In some cases, large policy shifts may require constitutional reform or amendment. The overall goal, in any case, is to be true to the values and priorities of the membership and to fully consider the impacts on, and the arguments of, minorities and reformers.

IX. Key Concepts

Whether tribal leaders are drafting legislation or whether tribal judges are deliberating on a specific case, where custom law is relevant and applicable, it will be necessary to consult the local experts and culture-bearers. This may take the form of a formal or informal committee charged with identifying relevant custom and communicating its findings to the ultimate decision-maker(s), who then must analyze the information, recharacterize the principle, and apply it to the particular policy purpose or litigation at hand. However, when it comes to discussions about custom, committee members and decision-makers can often get bogged down with semantics and find themselves in heated arguments about what is or is not “the custom” or “the tradition.” In my past work with tribes, it has been helpful to begin such meetings with an introduction to key concepts and definitions in order to create a common vocabulary and to avoid lengthy, unproductive fights over meaning. Below I outline the key concepts discussed in the first part of this article. I have also

included a sample discussion outline for working with custom law finding committees (see Appendix A).

Helpful key concepts for finding custom law include the following:

(1) Recognize that every functioning group or subgroup within a tribe has its own, naturally arising legal system and law, both traditionally and presently. The big question is whether and how the tribal law should recognize and reinforce group and subgroup custom law;

(2) Recognize that there is a difference between “custom law” and “values” and that custom law is discovered by looking at the underlying principles of past and present decisions of persons of authority within a group or subgroup, where he or she has solved, advised, or approved a solution in real disputes. The deciding principle is the custom law. Custom law principles may be more valuable than mere value statements, as they are derived from live conflicts and the actual decisions of group/subgroup authorities;

(3) Recognize that some group or subgroup authority’s decisions may not generate custom law if they do not include principles intended to apply to similar situations in the future. Decisions that are applied on a one-time basis to particular parties or events are political and do not necessarily include principles that are useful for integration into the tribal law;

(4) Recognize that many custom law principles are derived from an identification of the relationship of the parties to a dispute, their duties and obligations to each other, the identification of a breach or failure of one party to meet his or her obligations, and a determination of the required remedies to make things right;

(5) Recognize that it is important to identify the traditional sanctions for breaching duties or for violations of custom law. “Sanction” is defined to include either physical or social-psychological experiences, negative (withdrawing rewards or favors) or positive (inflicting pain), and may be man-made or supernatural. The important questions here are if, when, and how the tribe should enforce the decisions of local authorities; whether tribal sanctions should be used to reinforce or replace traditional sanctions; and/or whether traditional sanctions should influence the creation of new, innovative tribal sanctions based on traditional concepts; and

(6) Recognize that it is important to consider whether it is just to adopt a group or subgroup’s custom law on a tribe-wide, or other basis. In order to be accountable to those bound by tribal law, it is critical that tribal leaders ensure that they have dedicated the time, attention, and funding to accurately identify and define custom law principles and that the public has notice and a real opportunity to comment upon proposed tribal legislation, including such custom law principles. It is also critical that tribal judges describe custom law

principles and the rationale for their application in a particular case in writing in each judicial decision — and that these decisions be publicly available.

X. Debates About Working with Custom Nationwide

A. Debates over the Use of Custom

A review of the legal literature reveals two general positions concerning the use of custom. The first position argues that custom *must be* considered as a fundamental part of self-determination¹⁷² and the second argues that the consideration of custom is at best impractical and at worst simply a form of resistance to all that Western legal culture represents.¹⁷³ From a tribal government perspective, compelling arguments are made for the use of custom. Zuni, for example, asks us to recall “the heavy hand of the federal government” in the development of our current tribal court systems, which should prompt a critical examination of the present state of our justice systems and the pursuit of future developments by design and not by default.¹⁷⁴ She also reminds us that our inherited systems are embedded in English history, law, and values, including the concepts of private land ownership and patriarchy.¹⁷⁵ Finally, she argues that there is a great danger in the use of exclusively non-Indian approaches, as they will create a gulf between Native people and their law where such law reinforces views that are contrary to accepted local values.¹⁷⁶ Porter echoes Zuni’s concerns but goes farther, arguing that the use of the Western adversarial process itself tends to breakdown relationships and community, thus compromising both persisting traditional ways and tribal sovereignty.¹⁷⁷

172. Zuni, *Strengthening*, *supra* note 16, at 18, 23, 27; Barsh, *supra* note 8, at 74, 88-89; Zion, *supra* note 8.

173. Joh, *supra* note 9, at 125.

174. Zuni, *Strengthening*, *supra* note 16, at 19.

175. *Id.* at 22-23.

176. *Id.* at 24.

177. I do not think that Porter is suggesting that tribes do away with their adversarial tribal courts completely. Rather, he clearly argues for the creation of policies and institutions for the righting of relationships (such as peacemaking). Such institutions may be annexed to an adversarial tribal court or be established privately, with encouragement from the tribal legislature to the tribal court to work in tandem with them. Porter, *supra* note 8, at 237-39. Barsh seems to wonder whether the breakdown in family attachments and social relationships was a precursor to our reliance on tribal courts that function like state courts with their deterrent weapons of economic penalties and incarceration.

The persuasive arguments against the use of custom, as opposed to those arguing that "it is simply too hard to use," come from both within and without tribal communities. Some traditional people argue that custom cannot change and should not be manipulated, and certainly should not be written down.¹⁷⁸ Some argue that custom no longer exists, or that even if it does, times have changed and not everyone will agree to its interpretation and application.¹⁷⁹ Finally, Joh argues that letting custom go could free tribal courts to focus their attention on other priorities.¹⁸⁰

B. The Argument That We Should Not Mess with Custom

Older members can often be heard to insist that we leave the custom alone, particularly that we not try to write it down. The problem is that custom is being tinkered with all the time in a multitude of ways that we are not noticing. If one thinks of custom and tradition as a smooth sandy beach and tribal codes and resolutions as footprints, it is possible to imagine the smooth outlay of custom and tradition being stamped out or disturbed with the passage of each new law, be it intentional or not. The question then becomes, do we want to alter it blindly or consciously with purpose?

Another important point is that there may be things about our tribal governments that don't fit quite right or that don't seem just or fair as they are based upon imported institutions and laws. For example, does it make any sense to treat a child as abandoned and to involve the court and social services simply because he is living with his grandma? In many ways grandma is traditionally a third parent and the tribal children's (dependency) code should reflect that fact. If we can't document and explore our custom, how can we undertake the task of reform with due care and how can we build any tribal institutional history? This is a conversation that we will need to have with our leaders and elders, especially given that our children will have to live with the institutions that we leave them.

C. The Argument That We Will Never Agree on the Definition, Interpretation, and Application of Custom

Of course we will never all agree on what must be the applicable custom. People the world over argue about the definition and meaning of law to further their own interests or politics or simply given diverse viewpoints. Why would

178. See, for example, the reference to this argument in Zuni Cruz, *Tribal Law*, *supra* note 16.

179. See, e.g., Joh, *supra* note 9, at 122.

180. *Id.* at 131.

defining custom law be any different? Further, just because not everyone agrees with the definition and application of federal and state laws does not make them inapplicable. If custom law is applicable, it is applicable. As tribal members we can control the content of our laws through our political systems, by voicing our positions in the legislative process, or by electing or removing leaders consistent with our priorities or views. While it is true that there will be times when we do not trust our leaders, and perhaps when we cannot remove them, these are problems of politics or problems with the distribution of power within our governments and are not necessarily problems specific to our custom. There may even be times when abusive leaders may justify their positions based upon certain customs. But this argues in favor of discussing and clarifying what custom is.

D. The Argument That Custom Is Inapplicable to Modern Life and Its Consideration Is Diverting Us from More Important Things

A frequently voiced argument is that certain customs are dead or that we have simply outgrown them. Perhaps this is true for some tribal communities, but I know that this is not true for many. Custom pervades our lives in ways that we often cannot see or simply don't reflect upon. For example, even though I live in California, I seem to care a great deal about how I am perceived at home on the Hopi Reservation. The Hopi normative structure still operates on me. We often over-estimate what has been lost.

It is suggested that tribes take up too much time and energy in working with their custom and that this effort might be better spent, for example, dealing with more important things like alcoholism or violence or with economic problems. However, I suspect that these "more important things" are intimately linked to and are involved in complex ways with our custom-and-tradition concerns. Recently I was reviewing the 2004 Arizona Youth Survey summarizing findings with respect to the Hopi Junior/Senior High School. The survey was designed to assess school safety, adolescent substance use, anti-social behavior, and the risk and protective factors that predict these adolescent problem behaviors. Interestingly, the study found that one of the few protective factors that Hopi teens benefit from is ceremonial participation.¹⁸¹ Turning away from our custom may actually make our more important problems worse.¹⁸²

181. ARIZ. CRIMINAL JUSTICE COMM'N, 2004 ARIZONA YOUTH SURVEY: HOPI JUNIOR-SENIOR HIGH SCHOOL, at app. B (on file with author).

182. See EDUARDO DURAN & BONNIE DURAN, NATIVE AMERICAN POST-COLONIAL PSYCHOLOGY (Richard D. Mann ed., State University of New York Press 1995) (1949); Maria

E. The Argument That It Is Difficult to Work with Custom Law

Legal scholars and professionals on both sides of the debate agree that it is difficult to work with custom. Some of these difficulties include: (1) inaccessibility given its oral nature;¹⁸³ (2) the need for community participation and tribal government funding of field work (oral interviews, documentation, analysis, and archiving);¹⁸⁴ (3) problems of authenticity where members with knowledge and experience will not participate;¹⁸⁵ (4) problems of accuracy where outside sociological or anthropological studies are colored by prejudice or mistake;¹⁸⁶ (5) problems with attorneys and advocates meeting ethical obligations to discover and plead custom;¹⁸⁷ (6) problems with tribal judges encouraging such pleading or taking judicial notice and documenting its application;¹⁸⁸ (7) problems of essentialism (representations of pre-existing human essences)¹⁸⁹ where it is assumed that there are “general Indian

Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES. 60 (1998), available at http://aianp.uchsc.edu/ncaianmhr/journal_online.htm (discussing the historical unresolved grief of American Indians and its link to current social pathology in Native peoples).

183. Zuni Cruz, *Tribal Law*, *supra* note 16; Zuni, *Strengthening*, *supra* note 16, at 24-25.

184. Zuni Cruz, *Tribal Law*, *supra* note 16; Zuni, *Strengthening*, *supra* note 16, at 25.

185. Joh, *supra* note 9, at 120 n.22.

186. *Id.* at 120.

187. Zuni, *Strengthening*, *supra* note 16, at 25.

188. *Id.* at 26-27.

189. In order to offer further clarification of the concept of essentialism, I cite here at length to the English Department's webpage at Emory University:

One of the central modes of representation is essentialism. Diana Fuss says that essentialism is most commonly understood as a belief in the real, true essence of things, the invariable and fixed properties which define the “whatness” of a given entity. . . . Importantly, essentialism is typically defined in opposition to difference. . . . The opposition is a helpful one in that it reminds us that a complex system of cultural, social, psychical, and historical differences, and not a set of pre-existent human essences, position and constitute the subject. . . . In a specifically postcolonial context, we find essentialism in the reduction of the indigenous people to an “essential” idea of what it means to be African/Indian/Arabic, thus simplifying the task of colonization. Nationalist and liberationist movements often “write back” and reduce the colonizers to an essence, simultaneously defining themselves in terms of an authentic essence which may deny or invert the values of the ascribed characteristics (see discussions on reclaiming the term “Third World,” particularly in Chandra Mohanty's “Introduction” to *Third World Women and the Politics of Feminism*, ed. Chandra Mohanty, Ann Russo, and Lourdes Torres [1991] 1-47). Edward Said

customs,” or that a judge, because she is Indian, may take judicial notice of most customs;¹⁹⁰ and finally, (8) difficulties with tribal court practice where there is a lack of key professionals, Western legal training, funding, and where custom may be invoked to justify the relaxation or virtual elimination of procedural rules.¹⁹¹ I argue here that solutions lie in strengthening our institutional structures, including updated codes and rules, increased and regular training, and consistent funding of custom documenting bodies and projects.

XI. Problems & Solutions for Documenting Custom in General

Problems with the accessibility of custom can be overcome by establishing and adequately funding permanent bodies mandated to document it. Other societies generate self-studies in the form of historical accounts, sociological and anthropological studies, and critical law reviews. They also compile legal encyclopedias condensing — topic by topic — the legal principles applied by their authorities over time (legal treatises). Such accounts, studies, compilations, reviews, and treatises, while they are not enforceable legal provisions like tribal codes or rules, provide a big picture backdrop for the making and application of written laws. They also generate debate about the deeper meaning of legal principles important to historical and contemporary issues and spur innovation to solve current problems. Many tribes situate the responsibility for the documentation of custom with the tribal legislature, which then may further delegate it to a body of elders and/or culture-bearers. This may happen informally or it may be implemented through code provisions or rules that establish such a body, give it a mandate, and authorize the tribal court to work in tandem with it.

argues against this inversion, suggesting that “in Post-colonial national states, the liabilities of such essences as the Celtic spirit, *négritude*, or Islam are clear: they have much to do not only with the native manipulators, who also use them to cover up contemporary faults, corruptions, tyrannies, but also with the embattled imperial contexts out of which they came and in which they were felt to be necessary” (Culture and Imperialism [1994] 16).

Brian Cliff, Postcolonial Studies at Emory: Essentialism (Spring 1996), <http://www.english.emory.edu/Bahri/Essentialism.html>.

190. Joh, *supra* note 9, at 120-21.

191. *Id.* at 123.

A. Custom Documenting Bodies

It is beyond the scope of this article to undertake a comprehensive review of tribal codes, resolutions, and case law establishing custom documenting bodies. However, there are some generally known tribal provisions that I will analyze here by way of example.¹⁹² Provisions establishing such bodies tend to be found in tribal judicial codes. These bodies are often given a dual mandate. First, they are mandated to document custom in topical areas designated by the tribal legislature.¹⁹³ The preferred form of documentation may take the form of a simple written "journal," or the high-tech "searchable video archive."¹⁹⁴ Alternatives in between might include audio and video tapes and written transcripts. Second, these bodies are mandated to work with tribal courts, either in a general advising capacity,¹⁹⁵ or as a decisional body given questions of custom where the parties either agree to submit questions¹⁹⁶ or where a tribal judge certifies a question on her own.¹⁹⁷

192. See, e.g., WHITE MOUNTAIN APACHE JUDICIAL CODE § 2.3 (1998), available at http://www.tribalresourcecenter.org/ccfolder/white_mtn_apache_judicial.htm. Compare *id.* with HOOPA VALLEY TRIBAL CODE § 2.1.03 (2005), available at <http://www.narf.org/nill/Codes/hoopacode/t2civil.htm>.

193. See, e.g., NATIVE VILLAGE OF BARROW JUDICIAL CODE § 3-7(E) ("The Elders Council shall engage in ongoing documentation of custom in the following areas and in any other areas deemed necessary and funded by Tribal Council: 1. How boys and girls are raised; 2. How property is distributed, transferred, and inherited; and 3. Roles and duties in marriage . . ."); see also WHITE MOUNTAIN APACHE JUDICIAL CODE § 2.3(A) ("In order that the ancient wisdom, teachings and ways of the White Mountain Apache people may live on and continue to guide the people in their daily lives, there shall be established an Apache Custom Advisory Panel, whose functions it shall be: (1) To meet at the call of, and under the direction of, the Tribal Council to discuss and record in a Journal their knowledge of the custom of the White Mountain Apache people.").

194. See, e.g., NATIVE VILLAGE OF BARROW JUDICIAL CODE § 3-7(E) ("This documentation shall be preserved in a searchable video archive, where possible and funded by Tribal Council, or on audio tapes and video tapes, and in written transcripts."); see also WHITE MOUNTAIN APACHE JUDICIAL CODE § 2.3(A) (establishing the Apache Custom Advisory Panel and mandating that it meet to discuss and record its discussions in a journal).

195. See, e.g., WHITE MOUNTAIN APACHE JUDICIAL CODE § 2.3(A) ("[T]here shall be established an Apache Custom Advisory Panel, whose functions it shall be . . . (2) To be available to the Tribal Court as advisors in matters of tribal custom.").

196. See, e.g., *id.* § 2.3(C)(1) ("If in a particular case there arises a question of custom which has not been addressed in the Journal of the Apache Custom Advisory Panel, the parties may, if they so choose, agree to the appointment of any three members of the Apache Custom Advisory Panel to hear the facts of the case and decide the question.").

197. See, e.g., NATIVE VILLAGE OF BARROW JUDICIAL CODE § 3-5(E) ("If the judge cannot take judicial notice of custom or tradition or if a question or dispute arises as to the existence

Tribal legislatures vary in the weight and precedential effect they give to custom found by such a body. In some cases, where the parties agree, the body is empowered to decide the whole case, questions of custom and disputed fact included.¹⁹⁸ But in other cases, it appears that the body is empowered only to find and/or decide specific questions concerning custom, which will then be applied as law, if deemed relevant, by the tribal judge in tribal court.¹⁹⁹ Some tribal legislatures have limited the precedential effect of the custom law decisions of such bodies.²⁰⁰ Others rely on the precedential effect of the tribal court opinions where they incorporate such body's decision or recommendations concerning custom.²⁰¹ In the latter case, the judge is likely to modify or even "spin" the characterization or application of custom somewhat to be consistent with the limited powers and remedies of the court. This is a policymaking activity.

While I feel the urge to comment on the pros and cons of these various approaches, I am hesitant to do so absent a review of the tribal court opinions applying such provisions. Tribal statutory schemes can be like tailored suits — a good fit for the particular governmental and cultural shape and appearing in many different styles and sizes. I will say that the successful operation of custom documenting bodies depends upon adequate levels of funding that are consistently maintained. Also, budgets should provide for the funding of technical support staff to do the actual taping, writing, archiving, and records maintenance — lest we work our elders half to death with the bureaucratic burdens of their mandate.

or substance of custom or tradition, the court shall certify that question to the Elder's Council.").

198. *See, e.g.*, HOOPA VALLEY TRIBAL CODE § 2.1.03(a) ("The parties . . . must agree to abide by the decision rendered by the person or persons that they determine to be the traditional finder or finders of law and fact.")

199. *See, e.g.*, NATIVE VILLAGE OF BARROW JUDICIAL CODE § 3-7(A) ("The Elders Council shall decide [questions about custom] only when certified to them by a Tribal Court judge . . . Questions about customs or traditions shall be reviewed by the Elders Council de novo. The Elders Council shall not decide questions of fact or relevancy"); *see also* WHITE MOUNTAIN APACHE JUDICIAL CODE § 2.3 C.(1) ("[T]he Court shall apply the custom as determined by the [Apache Custom Advisory] Panel.").

200. *See also* WHITE MOUNTAIN APACHE JUDICIAL CODE § 2.3(C)(2) ("The decision of the Apache Custom Advisory Panel members on a particular question of custom in an individual case shall not be determinative of any case other than the one for which the determination was made").

201. *See, e.g.*, NATIVE VILLAGE OF BARROW JUDICIAL CODE § 3-7 ("A decision of the Elders Council shall not be binding precedent until it is incorporated into an opinion of the Tribal Court.").

B. Problems and Solutions for Working with Outside Experts and Studies

This is one of those areas where it may be helpful to borrow from, and modify, Western law, particularly rules of evidence. A number of tribes authorize their courts to consider outside expert testimony and studies in identifying applicable custom law, sometimes giving the same or greater weight to these sources than to customs found by elders or culture-bearers. As can be seen from the first half of this article, reliable outside studies are extremely useful. The problem for judges is discerning the difference between romantic, racist, or simply erroneous characterizations based upon mere opinion or fantasy, and field work, documentation, analysis, and conclusions based upon reliable methodologies. I would also reiterate that outside studies must focus on the appropriate legal level to be relevant and applicable. For example, characterizations about Indians in general or Hopis in general may be imprecise in a particular case and should not necessarily be relied upon to frame applicable custom law.

A good starting point would be to look at the Federal Rules of Evidence provisions governing professional expert witnesses and expert publications (most state evidence rules are based on the federal rules). It would also be instructive to look at comparative tribal imports and modifications of these same provisions and how they have been applied in real cases.

C. Problems and Solutions for the Pleading and Proving of Custom

Many tribes today statutorily mandate the application of custom by tribal courts, generally absent applicable tribal constitutional and statutory provisions and applicable tribal common law.²⁰² Over the years there has been a good deal of finger pointing between tribal judges, attorneys, advocates, parties, and even elders and culture-bearers over who is ultimately responsible for researching (or knowing) and formally raising questions of custom in tribal court. Tribal judges in the early days argued that they could only address the issues raised by the parties in their written pleadings or in their oral arguments before the court. If a party hired a nonmember attorney or advocate to speak for them in court and that person did not know or understand the local ways,

202. See, e.g., *id.* 3-11(A) ("The Tribal Court, in deciding matters of both substance and procedure, in cases otherwise properly before the Tribal Court, shall look to and give weight as precedent to the following mandatory authorities in the following order: 1. The Constitution and Bylaws of the NVB Tribe; 2. Agreements with other tribes entered into by the NVB Tribal Council; 3. Statutes of the NVB Tribe; 4. Resolutions of the NVB Tribe; 5. Common law of the NVB Tribal Court; and 6. Custom of the NVB Tribe.").

the party was simply out of luck because the tribal judge was not going to notice custom for them. To be fair to the judges, in the early days, many of them were nonmembers who could not be expected to know or understand local customs.

Today, with the advent of revised codes, rules and further developed case law, many tribes now require the judge to notice relevant, generally known custom.²⁰³ Additionally, a growing number of tribes have provisions or rules setting out attorney and advocate responsibilities for the pleading and proving the applicability of custom.²⁰⁴ Nevertheless there remain some significant concerns. Primarily, who will pay the attorney or advocate to do the extra work? In the Western system the parties pay. This is troubling, as it has been my experience that it is usually the more traditional parties, particularly elders, that need or want to assert the relevance of custom. They are usually the parties least likely to be able to afford attorneys fees. The problem is a structural one. Our tribal governments by default have put the financial burden on our elders to find and plead custom. Where are our institutionally mandated self-studies? Where are our custom law treatises or archives? Where are our tribal bar study materials and exams requiring attorneys and advocates to have some basic knowledge of our custom law? Tribal leaders, and particularly tribal legislatures, need to give serious attention to shifting the financial burden off of our more traditional and elder parties and onto government where it belongs.

203. See, e.g., NAVAJO R. EVID. 5 (available at NAVAJO NATION CODE tit. 7, § 204(a) (2005)), cited in *Dawes v. Yazzie*, No. A-CV-01-85 (Navajo Sup. Ct. July 10, 1987) (requiring the court to take judicial notice of Navajo traditional law if it is generally known within the community - and famously restated in tribal law circles as "those facts every damn fool knows"); see also NATIVE VILLAGE OF BARROW JUDICIAL CODE § 3-5(C) ("The court may take judicial notice of Inupiat custom or tradition only if the court finds the custom or tradition to be generally known and accepted within the NVB Tribal community.").

204. See, e.g., *Hopi Indian Credit Ass'n v. Thomas*, No. AP-001-84 (Hopi App. Ct. Mar. 29, 1996), available at <http://www.tribal-institute.org/opinions/1996.NAHT.0000007.htm> ("A party who intends to raise an issue of unwritten custom, tradition or culture shall give notice to the other party and the court through its pleadings or other reasonable notice. The intent of this notice is to prevent unfair surprise The proponent of Hopi customs, traditions and culture must then (1) plead them to the court with sufficient evidence so as to establish the existence of such a custom, tradition or culture and then (2) show that the recognized custom, tradition or culture is relevant to the issue before the court. The relevancy of Hopi custom, tradition or culture as to any legal matter should not be presumed.") (citations omitted).

D. Problems and Solutions and Tribal Court Hearings to Find Custom

Assuming that custom is pled by a party and can't be noticed by a tribal judge, there needs to be special rules for holding hearings to find it. Three aspects of Western court process are likely to undermine custom law finding goals. First, the evidence rules governing expert witness testimony are designed for scientific expert testimony and will need to be modified to recognize the expertise of local culture-bearers and elders, except in those cases where it is being applied to outside experts. Second, in the Western adversarial process, parties and their attorneys generally select their own witnesses and the attorneys pose the questions to those witnesses. In a purely adversarial process attorneys prioritize winning their case over accurately identifying and applying custom. They are likely to select traditional experts who will favor their client's positions. Consequently witness selection and the questions to be asked of them will require more judicial supervision if there is a commitment to accurately characterizing relevant custom. Third, court rules of civil and criminal procedure permit aggressive questioning by attorneys of expert witnesses. This discourages traditional experts from participating in the custom law-finding hearings. There is a need to modify the rules for questioning expert witness to balance encouraging knowledgeable testimony on relevant customs with the right of the parties to challenge the reliability of the testimony and applicability of the custom.

Some tribes follow a Western approach and allow for party selected witness, subject to preliminary questioning and challenge for lack of knowledge by the other party.²⁰⁵ Other tribes require judicial approval of the witnesses selected by the parties.²⁰⁶ In both situations, there are concerns with

205. See, e.g., HOOPA VALLEY TRIBAL CODE § 2.1.04(c)(2)(A) ("[E]ach party shall be allowed to call their own expert witnesses. The Court will determine how many expert witnesses each party may call to testify except that each party shall be allowed to call the same number of expert witnesses."); see also *id.* 2.1.04(c)(2)(B) ("Each party shall submit a list of Tribal elder's names that they wish to call as expert witnesses. The opposing party will have the right to voir dire the witnesses to determine if they are, in fact, knowledgeable of traditional tribal law.").

206. See, e.g., *In re Komaquaptewa*, No. 01AP000013, at ¶ 74, n.16 (Hopi App. Ct. Aug. 16, 2002), available at <http://www.tribalresourcecenter.org/opinions/opfolder/2002.NAHT.0000002.htm> ("The Court should notice the village and the parties as to the hearing and its purpose, offer guidance as to the kinds of witnesses it seeks, and explain in detail the narrow purpose of a fact-finding hearing to find customary law. Depending on the specific law sought, the judge should try to provide guidance to the Village and the parties for choosing their witnesses. The parties and the Village should then submit a list of potential witnesses along with explanations of the reason for their inclusion on the list, and the type of testimony they can

hearing from traditional experts who will focus on defining relevant customs and not testifying on the facts of the case. At least two tribes actively seek “neutral” experts.²⁰⁷ With respect to the questions, some tribes allow the parties to initially frame the questions to be asked but authorize the judge to approve the final list of questions to be asked.²⁰⁸ Other tribes give more control to the judge by authorizing him to draft initial lists of questions, get party feedback, and then to approve the final list of questions.²⁰⁹

Finally, considerations of fairness to the parties will require the holding of multiple hearings, typically three or more including: (1) the initial hearing on the disputed facts; (2) the custom finding hearing(s) where the judge hears from the traditional experts and the outside experts; and (3) the fact-finding hearing where the judge applies the custom law to the facts in dispute. The last hearing is critical to ensuring a fair process as it gives the parties a chance

offer. Although the trial judge should give deference to the village’s selection of witnesses, the judge should exercise discretion in approving the final list.”).

207. In the case of *Smith v. James*, No. 98AP000011, (Hopi App. Ct., 1999), the Hopi Appellate Court directed the trial court to obtain a list of potential traditional expert witnesses from the village where the dispute arose, in addition to party selected traditional expert witnesses. See also HOOPA VALLEY TRIBAL CODE § 2.1.04(c)(2)(A)(C) (“Each party shall also submit to the Court a list of Tribal member’s names that the parties believe to be neutral and impartial, and knowledgeable of traditional tribal law. The Court shall select from the submitted list names of individuals to act as expert witnesses for the Court.”); *id.* § 2.1.04(c)(3) (“The Court may, but is not required to, accept recommendations of the parties before determining the neutral and impartial expert witnesses that will testify before the Court. The Court will determine how many neutral and impartial witnesses may testify except that the number will not exceed the number of witnesses that each party will be allowed to call as expert witnesses. The parties will have the right to Voir Dire the witnesses to determine if they are, in fact, knowledgeable of traditional Tribal Law.”).

208. See, e.g., HOOPA VALLEY TRIBAL CODE § 2.1.04(d) (“After the expert witnesses have been determined, the parties will submit to each other and the Court a list of questions to be asked of each of the witnesses. A party may object to any question submitted by an opposing party. The Court will then determine which questions will be asked of each of the expert witnesses. The Court shall have the discretion to ask its own questions of the expert witnesses.”).

209. See, e.g., *Komaquaptewa*, No. 01AP000013, ¶ 74, n.16 (“Once the witness list has been assembled, the judge should present an initial list of proposed questions to the parties and permit them to offer suggestions. The judge should be responsible for framing this list because this will ensure that questions do not seek to establish matters, but instead seek to discern general principles of village practice. Answers given in the initial testimony, however, will invariably raise new questions. Therefore, in future hearings the parties should be afforded another opportunity to provide additional questions in response to testimony. The judge can then immediately return and ask these questions of the witnesses. Such a procedure will help eliminate potential gaps in the law.”).

to make arguments and present evidence after they know what the applicable custom law standard will be.²¹⁰

Again, this is an expensive process for the parties. Clearly members would benefit greatly from having the option to avoid litigation and to use traditional or alternative dispute resolution processes such as peacemaking. However, it is important to stress here that larger tribes are likely to require both adjudicative and relationship-righting processes. Modern life has changed member needs and expectations, causing them to forum shop — to seek a decision in whatever process that will let them win. Many of us have witnessed what happens in tribes where there is no tribal court or where the only available dispute resolution forum is traditional or alternative. Tribal members will run to state and federal courts to have their matters handled. Zuni's admonition applies here. Do we want to have some control over the way our people's disputes are handled and the laws, principles, and values that will be applied to them or are we content to sit back and let change happen to us? If we seek to control the direction of our future we will need to adopt or amend court rules and rules of evidence accordingly.

Conclusions

The discussion of key concepts and the highlighted tribal provisions and rules dealing with custom in this article are my attempt to focus the attention of tribal leaders, judges, professionals, and academics inward. We now have the education and expertise among us to reform our institutions and laws to fit who we are and what we need. We should expect more from our governments, including reasoned policymaking, targeted funding, and a commitment to be accountable to the tribal public. The average American expects no less from state and federal government. The process of reform will generate important questions about the nature of law in general and the definition of, and reinforcement of, applicable customs in particular. These questions will need to be debated internally on an ongoing basis. At different points in time consensus or compromise will happen. It is hoped that the theoretical and analytical tools outlined here will assist with this process.

210. For an illustration of this problem, see *Smith v. James*, No. 98AP000011 (Hopi App. Ct., 1999). This is the appeal of *James v. Smith*, No. CIV-019-94 (Hopi Tribal Ct. Apr. 17, 1998), described in the first half of this article, where the Hopi Appellate (Supreme) Court vacated and remanded the trial court order with instructions to hold a new customary law hearing and trial, specifically giving the parties the opportunity to make new arguments and proofs after the applicable custom law principles were discerned and put in writing by the trial judge.

APPENDIX A

SAMPLE DISCUSSION OUTLINE FOR WORKING
WITH CUSTOM LAW FINDING COMMITTEES

I. How do we recognize and incorporate “custom”?

A. What terms and definitions should we use when
working with “custom”?*“Social Norm” vs. “Legal Norm”**“Tradition” vs. “Current Practice”**“Traditional Authority” vs. “Modern Secular Authority”**“Traditional Legal Levels” & “Secular Legal Levels”**“Policymaking”*

1. “Social Norm” vs. “Legal Norm”

*“Social Norm” – A felt standard of proper behavior**“Legal Norm” – A felt standard of proper behavior backed by
official recognition or sanction*

Identify a social norm in your community. What is something that
everyone says you should or shouldn't do?

Identify an unwritten legal norm in your community. What is something that everyone says you should or shouldn't do? What happens to you if you do or omit to do this thing?

2. "Tradition" vs. "Current Practice"

"Tradition" – Old values or ways of doing things

"Current Practice" – Current, generally accepted ways of doing things

Identify a tradition in your community. What is the old way of doing things? How have things changed? Is there a different current practice for this tradition now?

3. "Traditional Authority" vs. "Modern Secular Authority"

"Traditional Authority" – The old offices or respected leaders

"Modern Secular Authority" – Constitutionally or statutorily recognized leaders or other leaders elected or appointed by the community

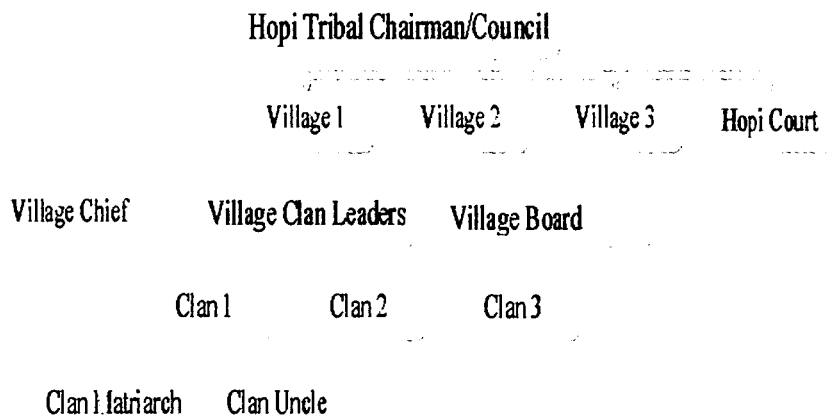
Identify several traditional authorities in your community:

Identify several tribal secular leaders:

4. "Traditional Legal Levels" & "Secular Legal Levels"

"Legal Levels" – Legal norms vary within different, traditional and secular legal levels, i.e., the custom law may be different for different villages, clans, bands, etc., within one tribe. The written tribal law (constitution, codes, resolutions, tribal court opinions and orders) may also deal differently with people from different villages, clans, bands, etc.

Example: The Hopi Tribe in Arizona



Identify your community's traditional and secular legal levels. Identify a norm that may be different from one place to the next. Is there written tribal law that recognizes different norms/rules for different groups?

5. "Policymaking," Custom, & Tradition

"Policymaking" – When you formalize custom in your written tribal law (constitution, code, or tribal court opinion), you are engaging in policymaking – that is picking and choosing bits of custom and putting them in your modern written tribal law – for a good reason.

Custom or Tradition

Tribal Policy

Mother's Sister = Mother

Mother's Sister has a right to notice of involuntary dependency hearings regarding her sister's children

Can you think of an example where your tribe has done this?
